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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 122.

JOHN I. ADAMS, WILLIAM H. RENAUD, JAY L. ADAMS, AND EDWARD C. ADAMS, COPARTNERS UNDER THE FIRM-NAME OF JOHN I. ADAMS & CO., PLAINTIFFS IN ERROR,

vs.

ADNA C. CONN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED OCTOBER 15, 1880.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

PROCEEDINGS IN THE STATE COURTS.

	Original.	Print.
Præcipe	1	1
Summons and return	2	1
Declaration and exhibits	3	2
Judgment by default	8	5
Appearance	11	7
Demurrer to declaration	11	7
Order overruling demurrer	13	8
Pleas	14	8
Demurrer to pleas	16	10
Petition for removal	18	11
Bond for removal	18	11
Petition for removal	19	11
Bond for removal	20	12
Order of court for removal	21	12

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT.

Defendant's rejoinder	23	13
Plea	25	15
Demurrer to rejoinder and plea	26	15
Hearing	28	16
Judgment	30	17
Bond for writ of error	30	17
Taxed cost bill of clerk	32	18
Writ of error	33	19
Citation	35	19
Service of citation	36	19
Clerk's certificate	39	20

1 Pleas in the circuit court of the State of Florida for the first judicial circuit, in and for the county of Escambia, in a certain case therein wherein John I. Adams, H. Renard, Jay L. Adams, and Edward C. Adams, copartners with firm-name of John I. Adams & Co., are plaintiffs, and Adna C. Conn is defendant.

Be it remembered that on the 27th day of January, A. D. 1876, came John I. Adams & Co., plaintiffs in the case aforesaid, by E. A. Perry, their attorney, and filed in the clerk's office of the circuit court aforesaid their præcipe for a summons ad respondendum in the words and figures following, to wit:

Circuit court, first judicial circuit, State of Florida, Escambia County.

JOHN I. ADAMS, WILLIAM H. RENARD, JAY L. ADAMS, and EDWARD C. ADAMS, copartners with firm-name of JOHN I. ADAMS & CO., *v.* ADNA C. CONN. } Damages, $14,000.

The clerk of said court will please issue summons ad respondendum in the above-stated case, returnable to first Monday in February, A. D. 1876.

E. A. PERRY,
Plaintiffs' Attorney.

JANUARY 27TH, 1876.

Whereupon a summons ad respondendum issued from the clerk's office aforesaid, which, with the return and endorsements thereon, is in the words and figures following, to wit:

2 THE STATE OF FLORIDA,
Escambia County:

To the sheriff of said county, greeting:

We command you that you summons Adna C. Conn to be and appear before the hon. the judge of our circuit court for the county of Escambia, at a court to be holden in the city of Pensacola, on the first Monday, being the rule day and the 7th day of February, 1876, inst., to answer the complaint of John I. Adams et al., copartners trading as John I. Adams & Co., in an action of assumpsit; damages claimed, $14,000. This you shall in no wise omit under the penalty of the law; and have you then and there this writ, with your proceedings endorsed thereon.

Witness R. A. Stearns, clerk of our said court, at the court-house aforesaid, this 27th day of January, A. D. 1876.

[SEAL.]

R. A. STEARNS,
Clerk C't Court,
Per A. M. GREEN,
Deputy Clerk.

(Endorsed:) J. I. Adams & Co. v. A. C. Conn. Sum's.
2117——1

Return.

Executed this 28th day of January, 1876, by delivering copy of within summons to Adna C. Conn, at his place of business, Molina, Escambia County, Florida.

A. W. GREEN, *Sheriff*,
By GEO. E. WENTWORTH,
Deputy Sheriff.

3 And afterwards, to wit, on the first day of March, 1876, came the said plaintiffs by their attorney, and filed in the clerk's office aforesaid their declaration in the words and figures following, to wit:

Circuit court, first judicial circuit, State of Florida, Escambia County.

JOHN I. ADAMS, WILLIAM H. RENARD, JAY L. ADAMS, and EDWARD C. ADAMS, copartners with firm-name of John I. Adams & Co.,
v.
A. C. CONN.

John I. Adams, William H. Renard, Jay L. Adams, and Edward C. Adams, copartners with the firm-name of John I. Adams & Co., by E. A. Perry, their attorney, and Adna C. Conn, for $14,000.

For that the said defendant, on and before the 19th day of November, 1874, was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York, under the provisions of the act of the legislature of said State of New York passed February 17th, 1848, entitled an act to authorize the formation of corporations for manufacturing, mining, mechanical, chemical, &c., purposes, and the various amendments thereof. And the defendant being such stockholder, and holding $75,000 of stock, or one-fourth of the stock, which was fixed at $300,000, and the said company doing business and having an agent and office in this said county, the said company became indebted to the said plaintiffs by promisory note of date November 19th, 1874, in the sum of $4,831.53, and the farther sum of $82.12 by account stated, copies of which note and verified account are filed herewith and made
4 dart hereof. And being so indebted, the said plaintiffs, on the 26th day of February, 1874, instituted their suit against the said company in this court to recover the said indebtedness, interest, and costs, and on the fourth day of May, 1875, the plaintiffs in this court recovered judgement against the said company for the sum of four thousand nine hundred and twenty-five dollars, together with the costs of said suit, which plaintiffs aver were $, a copy of which judgement is filed herewith and made a part hereof. And the said company became further indebted to the plantiffs by promissory note of date December 21st, 1874, due ninety days thereafter, in the sum of $1,382.32, a copy of which promissory note is filed herewith and made part hereof. And being so indebted, the said plaintiffs, on the 26th day of May, 1875, instituted their further suit against the said company in this court to recover the said last-mentioned indebtedness, and interest and costs; and on the 8th day of June, 1875, the plaintiffs in this court recovered further judge-

ment against the said company for the further sum of fourteen hundred and two dollars and forty-eight cents, together with the costs of said suit, which plaintiffs aver were $, a copy of which last-mentioned judgement is filed herewith, and made part hereof.

That by reason of the said company being adjudicated a bankrupt by the district court of the United States for the southern district of New York, on the day of , A. D. 1875, the plaintiffs' were prevented from taking any of the property of the said company under execution in satisfaction of the said two several judgements.

That upon said judgements executions were duly issued, but were returned by the sheriff of said county wholly unsatisfied.

That the property of said company has been sold by order of said bankrupt court, and that the proceeds of said sale will not more than pay the costs and expenses of the bankrupt proceedings leaving nothing to be applied to the satisfaction of said judgments or to be paid to the plaintiffs and other creditors, and that said judgments have not and cannot be satified, either in whole or in part, out the assets of said company.

That by the provisions of said act of the legislature of the State of New York all the stockholders of said company are severally individually liable to the creditors of the company, to the amount of stock held by them respectively, for all debts and contracts made by said company, until the whole amount of capital stock fixed and limited by such company shall have been paid and a certificate thereof shall have been made, signed, and sworn to by the president and a majority of the trustees and recorded in the office of the county clerk of the county wherein the business of the said company is carried on. And the said plaintiffs aver that the said company failed to comply with the said provisions of said acts, and did not, by its president and a majority of the trustees, make, sign, swear to, and record such certificate, either in the county of New York, the county in which the operations of said company were by their articles to be carried on and their principal business done, or in the county of Escambia, Florida, in which said company did their business, or in anywise as required by said act to exempt the defendant; whereupon the said defendant became and is liable to the plaintiffs for the said debt and said contract made by said company, and the plaintiffs claim $14,000 and bring this suit.

E. A. PERRY,
Plaintiffs Attorney.

Copy of note.

$4,831.53.] NEW YORK, *November 19th*, 1874.

Due February 20th, 1874, $4,831.53.

Ninety days after date pay to the order of John I. Adams & Co. four thousand eight hundred thirty-one and $\frac{53}{100}$ dollars, value received, and charge the same to account of as advised.

JNO. D. GARDINER,
Manager Pensacola Lumber Co.

To NEHEMIAH KNIGHT, Esq.,
Treasurer Pensacola Lumber Co., Franklin St., New York.

Acceptance on face of note.

NEW YORK, *November 19th*, 1874.

Accepted. Payable at the office of the company, room 91, Drexel Building.

NEHEMIA H. KNIGHT,
Treasurer Pensacola Lumber Co.,
By L. H. TROWBRIDGE,
Acting.

Exhibits attached to declaration.

NEW ORLEANS, *December 7th*, 1874.

Pensacola Lumber Co. bought of John I. Adams & Co., wholesale grocers and commission merchants and dealers in wines and liquors, Nos. 45, and 47 New Levee (now Peters street):

1 bl. ker oil, 55½, @ 20	11 10
1 box milk, 4, 2.65	10 60
Dray	50
	$22 20

NEW ORLEANS, *December 8th*, 1874.

Pensacola Lumber Co. bought of John I. Adams & Co., wholesale grocers, &c:

10 sacks corn, 25½, @ 96	24 48
5 bbls. flour, 7.25	36 25
7 Dray	1 00
Com., 24.48, @ 2½	61
	$62 34

NEW ORLEANS, *December 11th*, 1874.

Pensacola Lumber Co. bought of John I. Adams & Co., wholesale grocers, &c.:

1 bbl. apples	5 25
5 bbls. meal, 4.25	21 25
2 b. hay, 4½	9 00
2 gr. matches, 2.75	8 25
½ bl. flour	4 50
2 bbls. pork, 22	44 00
1 box soap, 60, @ 6	3 60
1 sack coffee, 133, 21	27 93
Dray	1 00
Com., 9, 2½	23
	$125 01

STATEMENT.

NEW ORLEANS, *February 25th*, 1875.

Pensacola Lumber Co. to John I. Adams & Co., 43, 45, and 47 New Levee, now Peters, Dr.

1874.			
December	7th.	Mdse	22 20
Do.	8th.	Do	62 34
Do.	11th.	Do	125 01
			209 55

CR.

December	7th.	Cash	127 43
1875.			
February	25th.	Due J. I. Adams & Co	82 12

8 *Copy of judgement.*

Circuit court, Escambia County, State of Florida.

JOHN I. ADAMS, WILLIAM H. RENAUD, JAY L. Adams, and Edward C. Adams, copartners with firm-name of John I. Adams & Co.,
v.
THE PENSACOLA LUMBER COMPANY.

This action having been commenced on the 26th day of February, 1875, and after due and legal service, and the defendant having appeared herein by attorney, and the defendant having failed to demur or plead to the declaration herein as required by law and the rules of court; and a default having been thereupon entered against the defendant according to law and the rules of court, now, this 4th day of May, 1875, came the plaintiffs, by E. A. Perry, their attorney, and upon application of plaintiffs, they having produced and filed such written instruments as form in part the cause of action, and the clerk having assessed the amount which the plaintiffs are entitled to recover for principal and interest upon such written instruments, and also having ascertained the amount which the plaintiffs are entitled to recover on the amount of the open account sued on, from proofs by affidavit and otherwise, and having found that the plaintiffs are entitled to recover from the defendant in this action, for their principal and interest to this date, thus assessed and ascertained, the sum of four thousand nine hundred and ninety-five dollars:

It is therefore considered and adjudged by the court that the said plaintiffs, John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners with the firm-name of John I. Adams &
9 Co., have and recover of and from the defendant, the said Pensacola Lumber Company, the said sum of four thousand nine hundred and ninety-five dollars thus assessed and ascertained, together with

their costs in and about this suit expended, and that they have execution therefor.

May 4th, 1875.

[SEAL.]

R. A. STEARNS,
Clerk C't Court,
By T. L. WATSON,
Deputy Clerk.

(Endorsed:) Entered and filed this May 4th, 1875. T. L. Watson, deputy clerk.

Circuit court, State of Florida, Escambia County.

JOHN I. ADAMS, WILLIAM H. RENAUD, JAY L. Adams, and Edward C. Adams, copartners with firm-name of John I. Adams & Co., } Action in assumpsit.
v.
PENSACOLA LUMBER COMPANY.

There having been due and legal service herein upon the defendant, and the defendant having failed to appear, and default having thereupon been entered against the defendant, the said Pensacola Lumber Company, according to law and the rules of court, now, this 8th day of June, A. D. 1875, came the plaintiffs, by their attorneys, and upon their application, they having produced and filed the written instrument which forms the cause of action, and the clerk having applied the amount which the plaintiffs are entitled to recover for principal and interest thereupon, and having found that the plaintiffs are entitled to recover from the defendant in this action, for their principal and interest to this date thus assessed, the sum of fourteen hundred and two dollars and forty-eight cents:

It is therefore considered and adjudged by the court, that the said plaintiffs have and recover of and from the said defendant, the Pensacola Lumber Company, the said sum of fourteen hundred and two dollars and forty-eight cents, their damages thus assessed, together with their costs in and about this suit expended, and that they have execution therefor.

June 8th, 1875.

[SEAL.]

R. A. STEARNS,
By THOMAS L. WATSON,
Deputy Clerk of Court.

(Endorsed:) Entered and filed June 8th, 1875. T. L. Watson, dep. cl'k.

Copy of note.

$1,382.32.] NEW YORK, *December 21st*, 1874.

Ninety days after date pay to the order of John I. Adams & Co. thirteen hundred eighty-two and $\frac{32}{100}$ dollars, value received, and charge the same to account as advised.

(Signed) JOHN D. GARDINER,
Manager Pensacola Lumber Co.

To NEHEMIAH KNIGHT, Esq.,
Treasury Pensacola Lumber Company, 107 Franklin Street, New York.

11 (Endorsement on face of note:)

OFFICE P. L. Co.

Payable at 91 Drexel Building.

NEHEMIAH KNIGHT,
Treasurer Pensacola Lumber Company.

And afterwards, to wit, on the 6th day of March, A. D. 1876, came the said defendant, by his attorney, and filed herein his appearance in the words and figures , to wit:

Circuit court, Escambia County, State of Florida.

JOHN I. ADAMS & CO.,
v.
ADNA C. CONN.

The clerk of said court will please enter my name as appearing for the defendant in the above-stated case.

RICH'D L. CAMPBELL,
Attorney at Law.

And afterwards, to wit, on the 27th day of March, A. D. 1876, came the said defendant, by his attorney, and filed herein his demurrer to the plaintiffs' declaration in the words and figures following, to wit:

Circuit court, State of Florida, Escambia County.

JOHN I. ADAMS & CO.,
v.
ADNA C. CONN.

The defendant, by his attorney, R. L. Campbell, says that the declaration is bad in substance—

First. Because it does not set forth any cause of action.

12 Second. Because it does not set forth a cause of action cognisable by this court.

RICH'D L. CAMPBELL,
Defendants' Attorney.

I hereby certify that in my opinion the foregoing demurrer is well founded.

R. L. CAMPBELL,
Defendants' Attorney.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, the defendant in the above case, being duly sworn, says, that the foregoing demurrer is not interposed for the purpose of delay.

A. C. CONN.

Sworn to and subscribed before me this day of March, A. D. 1876.

R. A. STEARNS,
Clerk C't Court.

And afterwards, to wit, on the 2nd day of August, A. D. 1877, at a special term of Escambia County circuit court, the following order was made:

JOHN I. ADAMS & CO.
v.
A. C. CONN. } Assumpsit.

This case is, upon demurrer, under advisement, and the same stands continued.

A. E. MAXWELL, *Judge.*

And afterwards, to wit, on the 6th day of October, A. D. 1877, at a regular term of Escambia County circuit court, the following order was made:

13 JOHN I. ADAMS & CO.
v.
A. C. CONN.

Ordered: that the foregoing case be continued to abide the final determination of the case of Flash, Lewis & Co. against the same defendant, the same being done by consent.

A. E. MAXWELL, *Judge.*

And afterwards, to wit, on the 18th day of July, A. D. 1878, at a special term of Escambia County circuit court, the following order was made herein:

JOHN I. ADAMS & CO.
v.
A. C. CONN. } Assumpsit.

In this case it is considered by the court that the defendants demurrer to the plaintiffs' declaration be, and the same is, overruled; and, upon defendant's application, he is permitted to plead to declaration within thirty days, and case continued.

A. E. MAXWELL, *Judge.*

And afterwards, to wit, on the 16th day of August, A. D. 1878, came the said defendant, by his attorney, and filed herein his pleas in the words and figures following, to wit:

In the circuit court, State of Florida, Escambia County.

14 JOHN I. ADAMS, WM. H. RENAUD, JAY L. Adams, and Edward C. Adams, copartners, with the firm-name of John I. Adams & Co.,
v.
A. C. CONN.

First. For plea to plaintiffs' declaration defendant says that by the statute of the State of New York referred to by plaintiffs' declaration it is provided that no stockholder of any company created thereunder shall

be liable for the payment of any debt of said company unless a suit for the collection of such debt shall have been brought against such company within one year after the debt shall have become due; and the defendant avers that no suit for the collection of the debts mentioned in the plaintiffs' declaration has been commenced in said State of New York, although more than a year has elapsed since the same became due and payable; and this the defendant is ready to verify, &c.

RICH'D L. CAMPBELL,
Defendant's Attorney.

Second. And for a further plea in this behalf defendant says that the said corporation, the Pensacola Lumber Company, was created on the 8th December, 1865, under the statute of the State of New York referred to in plaintiffs' declaration; that all its capital stock was paid in within a year after its formation; that defendant did not become a stockholder of said corporation until about 18th of April, 1872, and that the provisions of the statute of the State of New York in relation to making and filing a certificate in the office of the county clerk, as set forth in the plaintiffs'
15 declaration, has no application to defendant or any stockholder except such as were stockholders within two years from the date of the formation of said company; and this the defendant is ready to verify.

Third. And for a further plea in this behalf the defendant says that *that* the orignal capital stock of said Pensacola Lumber Company was 75,000 dollars, all of which was paid up in full; that the defendant was the holder and owner of one-fourth thereof, or 18,750 dollars; that he has paid debts of said corporation over and above that sum already; and this he is ready to verify, &c.

RICH'D L. CAMPBELL,
Defendant's Attorney.

Fourth. And for a further plea in this behalf the defendant says he did not become a stockholder of the said Pensacola Lumber Company until four years after the lapse of the period of two years and 30 days from the formation thereof, within which said period said certificate of the payment of the capital stock referred to in the plaintiffs' declaration should have been filed in the office of the county clerk, as provided by the statute of New York referred to in plaintiffs' declaration, and therefore plaintiffs are barred of all right of action against the defendant founded on an omission, if any, to file said certificate; and this the defendant is ready to verify, &c.

Fifth. And for a further plea in this behalf the defendant says that it is provided in and by the statute of the State of New York referred to in said declatation that no stockholder of any company formed thereunder shall be personally liable for the payment of any debt contracted by said company until an execution against said company, issued from a court of said State, shall have been returned unsatisfied in whole or in part, and that the said defendant says that no such execution has ever been issued by or under the authority of any court of the said State and returned unsatisfied; and this the defendant is ready to verify, &c.

16 RICH'D L. CAMPBELL,
Defendant's Attorney.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, within-named defendant, being duly sworn, says that the within pleas are true, to the best of his knowledge and belief.

A. C. CONN.

Sworn to and subscribed before me this 15th day of August, A. D. 1878.

O. W. AVERY,
County Judge.

And afterwards, to wit, on the 28th day of August, A. D. 1878, came the said plaintiffs, by their attorney, and filed herein their demurrers and replication to defendant's pleas in the words and figures following, to wit:

Circuit court, Escambia County, State of Florida.

JOHN I. ADAMS & CO.
v.
A. C. CONN.

Plaintiffs demur to defendant's first plea, and say for cause that the said plea does not state facts sufficient to constitute a defense. It does not appear by said plea that there is any statute of the State of New York which requires suit to have been brought against the company in the State of New York within one year after the debt became due.

Plaintiffs demur to defendant's second plea, and say for cause that the said plea does not state facts sufficient to constitute a defense, and the said plea is insufficient in divers respects.

17 Plaintiffs reply to defendant's third plea, and for replication say that before the making of the contract and creating the indebtedness the cause of action here, to wit, in January, 1874, the said Pensacola Lumber Company increased its capital stock to a much greater sum than $76,000, to wit, to $300,000, of which the defendant was the holder and owner of one-fourth, or $75,000, and that defendant has not paid debts of that corporation for that last-mentioned sum.

Plaintiffs demur to defendant's fourth plea, and say for cause that the said plea does not state facts sufficient in law to constitute a defense.

Plaintiffs reply to defendant's fifth plea, and for replication says there is no statute of New York, referred to in said declaration or otherwise, which provides that no stockholder of any company formed thereunder shall be personally liable for the payment of any debt contracted by such company until an execution issued by a court of the State of New York shall have been returned unsatisfied in whole or in part, in manner and form as alleged in defendant's said plea.

E. A. PERRY,
Plaintiffs' Attorney.

And afterwards, to wit, on the 2nd day of September, A. D. 1878, came the said defendant, by his attorney, and filed herein his petition for removal of such case to the circuit court of the United States for the northern district of Florida, at Pensacola, and also filed his bond for removal in the words and figures following, to wit:

In the circuit court of the first judicial circuit of the State of Florida, in and for Escambia County.

To the Hon. A. E. Maxwell, judge of said court:

The petition of Adna C. Conn respectfully represents to your honor that he is a citizen of the State of Florida; that an action has been brought against him in this court by John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the style of John I. Adams & Co., some of the plaintiffs being citizens of the State of Louisiana; that the amount in controversy is more than $5,000, exclusive of costs; and your petitioner, under the act of Congress of 3d March, 1875, prays that the said action may be removed into the circuit court of the United States for the northern district of Florida.

And your petitioner will ever pray, &c.

September 2nd, 1878.

A. C. CONN,
By RICH'D L. CAMPBELL,
His Attorney.

Know all men by these presents that we, Adna C. Conn, Thomas Morgan, and Daniel F. Sullivan, are held and firmly bound unto John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the style of John I. Adams & Co., in the sum of two hundred and fifty dollars, for the payment of which well and truly to be made we bind ourselves, jointly and severally, firmly by these presents. Given under our hands and seals this 2nd day of September, A. D. 1878.

The condition of the above obligation is such that whereas the said Anda C. Conn has petitioned for the removal of a cause wherein he is a defendant, and the said John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the style of John I. Adams & Co., are plaintiffs, from the circuit court of Escambia County, State of Florida, to the circuit court of the United States for the northern district of Florida, at Pensacola, under the acts of Congress of 3d March, 1875:

Now, therefore, if the said Adna C. Conn shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and pay all costs that may be awarded by the said circuit court of the United States if said court shall hold such suit was wrongfully or improperly removed thereto, then this obligation to be void; else to be and remain in full force and virtue.

A. C. CONN. [SEAL.]
THOMAS MORGAN. [SEAL.]
D. F. SULLIVAN. [SEAL.]

Approved.

A. E. MAXWELL, *Judge.*

And afterwards, to wit, on the 19th day of February, A. D. 1879, came the said defendant, by his attorney, and filed herein his petition for removal of said case to the circuit court of the United States for the northern district of Florida, at Pensacola, and also filed his bond for removal, and which petition and bond are in the words and figures following, to wit:

In the circuit court of first judicial circuit of the State of Florida, in and for the county of Escambia.

JOHN I. ADAMS, JAY L. ADAMS, WILLIAM H. Renaud, and Edward C. Adams, copartners under the style of John I. Adams & Co., } Assumpsit.
v.
ADNA C. CONN.

The petition of Adna C. Conn, the defendant in the above-stated case, respectfully shows unto your honor—

20 That your petitioner was at the commencement of said suit and is now a citizen of the State of Florida, and that at the commencement of this suit said plaintiff Jay L. Adams was and is now a citizen of the State of New York, and said John I. Adams, William H. Renaud, and Edward C. Adams were and are now citizens of the State of Louisiana. That the amount in controversy in said suit is more than 5,000 dollars, exclusive of costs.

And your petitioner therefore prays that said suit may be ordered by this court to be removed to the circuit court of the United States for the northern district of Florida, at Pensacola, under the 2nd and 3d sections of an act of Congress "to determine the jurisdiction of the courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," approved March 3d, 1875.

RICH'D L. CAMPBELL,
Attorney for Petitioner.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, the above petitioner, being duly sworn, says that the facts set forth in the foregoing petition are true.

A. C. CONN.

Sworn to and subscribed before me this 6th day of February, A. D. 1879.

O. M. AVERY,
County Judge.

Know all men by these presents that we, Adna C. Conn, Thomas Morgan, and J. B. Vaughn, are held and firmly bound unto John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the style of John I. Adams & Co., in the sum of two hun-

21 dred and fifty dollars, for the payment of which well and truly to be made we bind ourselves, jointly and severally, firmly by these presents. Given under our hands and seals this 6th day of February, A. D. 1879.

The condition of the above obligation is such that whereas the said Adna C. Conn has petitioned for the removal of a cause wherein he is defendant and the said John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the style of John I. Adams & Co., are plaintiffs, from the circuit court for Escambia County, State of Florida, to the circuit court of the United States for the northern district

of Florida, at Pensacola, under the act of Congress of 3d of March, 1875:

Now, therefore, if the said Adna C. Conn shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and pay all costs that may be awarded by said circuit court of the United States if said court shall hold such suit was wrongfully or improperly removed thereto, then this obligation to be void; else to be and remain in full force and virtue.

A. C. CONN. [SEAL.]
THOMAS MORGAN. [SEAL.]
J. B. VAUGHN. [SEAL.]

Approved February 15th, 1879.

A. E. MAXWELL, *Judge.*

And thereupon, on the 15th day of February, A. D. 1879, and bearing date of filing the 19th day of February, A. D. 1879, the following order was made herein:

Circuit court, State of Florida, Escambia County. At chambers.

Upon reading the foregoing petition, and it appearing that said
22 petitioner, Adna C. Conn, has given bond as required by the 3d section of the act of Congress mentioned in said petition, it is ordered that the above-stated case be, and the same is hereby, removed to the circuit court of the United States for the northern district of Florida, at Pensacola.

A. E. MAXWELL, *Judge.*

FEBRUARY 15th, 1879.

STATE OF FLORIDA,
Escambia County:

I, F. E. de la Rua, clerk of the circuit court in and for the county of Escambia, first judicial circuit of Florida, do hereby certify that the foregoing pages, numbered from one to twenty-five, and part of page twenty-six, inclusive, constitute a true copy of all the proceedings and a correct transcript of the records in the case of John I. Adams & Co., plaintiffs, and Adna C. Conn, defendant, as appears upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 20th day of February, A. D. 1879.

[SEAL.] F. E. DE LA RUA,
Clerk Circuit Court for the County of Escambia.

(Endorsement on record:) John I. Adams & Co. *v.* A. C. Conn.
23 Transferred from Escambia County circuit court to United States circuit court. Filed March 3d, 1879. George E. Wentworth, clerk.

Proceedings begun and had in the circuit court of the United States, fifth judicial circuit, northern district of Florida, at Pensacola, in a cause removed by petition from the circuit court of Escambia County, first judicial circuit, State of Florida, wherein John I. Adams, H. Renaud, Jay L. Adams, and Edward C. Adams, copartners doing business under the firm-name of John I. Adams & Co., are plaintiffs, and Adna C. Conn is defendant.

In the circuit court of the United States, fifth circuit, northern district of Florida, at Pensacola.

JOHN I. ADAMS & CO.
v.
A. C. CONN.

And the said defendant' for a rejoinder to the said plaintiffs' replication to the defendant, third plea, says that is true the capital stock of said corporation was increased to the sum of $300,000, as alleged in said replication; but that upon an increase of the capital stock of a corpora-
24 tion, under the statute of New York in the plaintiffs' declaration mentioned, the only certificate required to be made and filed in the office of the county clerk is one showing the proceedings of the meeting of stockholders to effect such increase, the amount of capital stock paid in, the business to which such corporation is extended or changed, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, made out, signed, and verified by the affidavit of the chairman, countersigned by the secretary, and acknowledged by the chairman. And the defendant avers said certificate was made and filed, when required by said statute, in the office of the county clerk of New York County, in the State of New York, where it was required to be filed, and also in the office of the secretary of state of the State of New York, where it was also required to be filed; and said defendant further avers that the full amount of said increased stock was afterwards fully paid up; that the said increase of the capital stock of said corporation was made and paid up and said certificates filed, as hereinbefore stated, long before the said corporation incurred the debts to the plaintiffs in their said declaration mentioned, and that it appears in and by said certificate, as the fact was, that all the original capital stock of $75,000 was fully paid up; and this the defendant is ready to verify. Wherefore he prays judgement, &c.

RICH'D L. CAMPBELL,
Defendant's Attorney.

(Endorsed:) United States circuit court, fifth judicial circuit,
25 northern district of Florida. John I. Adams & Co. v. A. C. Conn. Rejoinder. Filed March 3d, 1879. G. E. Wentworth, clerk.

In the circuit court of the United States, fifth judicial circuit, northern district Florida, at Pensacola.

JOHN I. ADAMS & CO.
v.
A. C. CONN.

And for a further plea to the said plaintiffs' declaration the defendant says that a large amount of debts besides that of the plaintiffs in this said declaration mentioned is due to other creditors of said corporation, and exceeding this defendant's ability to pay; and this he is ready to verify. Wherefore he prays judgement, &c.

RICH'D L. CAMPBELL,
Attorney for Defendant.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, the defendant in the above case, being duly sworn, says the above plea is true.

A. C. CONN.

Sworn to and subscribed before me this 4th day of March, A. D. 1879.
GEO. E. WENTWORTH,
Clerk.

26 (Endorsed:) United States circuit court, fifth judicial circuit, northern district of Florida. John I. Adams & Co. v. A. C. Conn. Plea. Filed March 6th, 1879. G. E. Wentworth, clerk.

Circuit court of the United States, northern district of Florida, at Pensacola.

JOHN I. ADAMS & CO.
v.
A. C. CONN.

Plaintiffs' demur to defendant's rejoinder to plaintiffs' replication to defendant's third plea, and for grounds say:

The said rejoinder does not state facts sufficient to constitute a rejoinder to said replication.

It does not traverse or in any wise avoid said replication.

It presents an immaterial issue, and is in other respects bad and insufficient in law.

Plaintiffs' demur to defendant's further plea (filed herein March 6th, 1879), and for grounds say:

27 The same does not state facts sufficient to constitute a defense, and is otherwise bad and insufficient in law.

E. A. PERRY,
Plaintiffs' Attorney.

UNITED STATES OF AMERICA,
Northern District of Florida:

I, E. A. Perry, counsel for plaintiffs, hereby certify that in my opinion the foregoing demurrers are well founded in law.

And the said plaintiffs being out of State, I make affidavit that the said demurrers are not interposed for delay.

E. A. PERRY,
Plaintiffs' Attorney.

Sworn before me this 12th March, 1879.

GEO. E. WENTWORTH,
Clerk.

(Endorsed:) John I. Adams & Co. v. A. C. Conn. Plaintiffs' demurrer to defendant's rejoinder to third replication, and demurrer to defendant's further plea filed March 6th, 1879. Filed March 12th, 1879.
28 Geo. E. Wentworth, clerk. E. A. Perry, plaintiffs' attorney.

United States circuit court, fifth judicial circuit, northern district of Florida, at Pensacola.

FRIDAY, *March 14th*, 1879.

Court met this day at 10 o'clock a. m., pursuant to adjournment.

Present, honorable William B. Woods, judge fifth judicial circuit, and honorable Thomas Settle, judge United States district court.

JOHN I. ADAMS & CO. } Assumpsit. Cause removed from State court.
v.
A. C. CONN. }

This cause coming on to be heard upon the plaintiffs' demurrer to the defendant's first, second, fourth, fifth, and sixth pleas, and the rejoinder to the replication to the third plea, and the argument not having been concluded at the hour of adjournment of the court, the same was postponed until the following day.

Ordered that this court adjourn until Saturday, March 15th, at 4 o'clock p. m.

29 SATURDAY, *March 15th*, 1879.

Court met this day at 4 o'clock p. m., pursuant to adjournment.

Present, honorable William B. Woods, judge fifth judicial circuit, and honorable Thomas Settle, judge United States district court.

JOHN I. ADAMS & CO. } Assumpsit. Cause removed from State court.
v.
A. C. CONN. }

Now on this day the argument of counsel in this cause, which was adjourned from yesterday, was resumed, and having been concluded the court took the same under consideration in order to determine upon its judgement.

Ordered that this court adjourn until Tuesday, March 18th, 1879, at 10 o'clock a. m.

United States circuit court, fifth judicial circuit, northern district of Florida, March term, 1880.

THURSDAY, *March 18th*, 1880.

Court met at 10 o'clock a. m., pursuant to adjournment.

Present, honorable Thomas Settle, judge, presiding.

30 JOHN I. ADAMS & CO. } Assumpsit. Cause removed from State
v. court.
A. C. CONN. }

This cause came on to be heard at the March, 1879, term of the court, upon the plaintiffs' demurrers to defendant's first, second, fourth, fifth, and sixth pleas, and to defendant's rejoinder to plaintiffs' replication to defendant's third plea, and the court having heard argument of counsel took the same under advisement; and now having determined that the plaintiffs' declaration is insufficient at law, it is therefore considered by the court that the plaintiffs take nothing by their said suit, and that the defendant have and recover his costs of suit, and that execution issue therefor.

It is ordered that this court adjourn until to-morrow, Friday, March 19th, at 10 o'clock a. m.

And afterwards, to wit, on the 19th day of March, A. D. 1880, came the plaintiffs, by their attorney, E. A. Perry, esq., and filed their bond for a writ of error, in words and figures following:

Know all men by these presents that we, John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners with firm-name of John I. Adams & Co., and F. C. Brent, are held and firmly bound unto Adna C. Conn in the full and just sum of five hundred dollars, to be paid to the said Adna C. Conn, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of March, A. D. 1880.

31 Whereas lately, to wit, on the 15th day of March instant, at a term of the circuit court of the United States for the northern district of Florida, in a suit depending in said court between the said John I. Adams & Co., plaintiffs, and the said Adna C. Conn, defendant, judgement was rendered against the said plaintiffs, and that said defendant recover his costs in said suit; and whereas the above-named John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the firm-name of John I. Adams & Co., have prosecuted a writ of error to the Supreme Court of the United States to reverse said judgement:

Now, therefore, the condition of this obligation is such that if the above-named John I. Adams & Co. shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good

their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN I. ADAMS, [SEAL.]
WILLIAM H. RENAUD, [SEAL.]
JAY L. ADAMS, [SEAL.]
ED. C. ADAMS, [SEAL.]
By their attorney in fact, E. A. PERRY.
F. C. BRENT. [SEAL.]

Sealed and delivered in presence of and approved by—
THOMAS SETTLE, *Judge.*

32 (Endorsed:) John I. Adams & Co. v. Adna C. Conn. Writ of error bond. Filed Mar'h 19th, 1880. Geo. E. Wentworth, clerk.

Cost bill.

JOHN I. ADAMS & CO.
v.
ADNA C. CONN.

Transferred from Escambia County circuit court. Transcript filed March 3d, 1879.

Filing and ent'g transcript, 20; filing and ent'g appearance, 20 ..	40
Fil'g & ent'g rejoinder, 20; fil'g & ent'g def't's sixth plea, 20; oath, jurat, & seal, 45	85
Fil'g & ent'g demurrer, 20; oath, jurat, & seal, 45; affidavit & seal, 45	1 10
Fil'g & ent'g interrogatories & cross, 40; issuing commission & seal, 1.45	1 85
Copy of instructions, 5 ffs., 75; fil'g & ent'g depositions, 20; ent'g order, publication of, 15	1 10
Publishing, 20; deposition & copy interrogatories for def't, 8 ffs., 1.20; docket & indices, 3.00	4 40
Taking & app'g security, 50; filing bond, 10; filing and ent'g cost bills, 40	1 00
Cert'f'd copy of judgement, 50; ent'g judgement, 2 ffs., 30; writ of error, 1.20; copy, 75	2 75
Fil'g writ of error & copy, 20; cert'f. & seal, 35; citation, 1.20; copy, 75; cert'f. & seal, 35	2 85
Fil'g citation & copy, 20; oath, jurat, & seal to service of citation, 45	65
Record for Supreme Court, 18.20; cert'f., 45; seal, 20	18 85
	$35 80
Attorney's tax fee	10 00
	$45 80

Taxed at forty-five and $\frac{80}{100}$ dollars.

GEO. E. WENTWORTH,
Clerk.

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Florida, greeting:

Because in the record and proceeding, and also in the rendition of the judgement of a plea which is in the said circuit court before you, between John I. Adams, H. Renaud, Jay L. Adams, and Edward C. Adams, copartners with firm-name of John I. Adams and Co., and Adna C. Conn, a manifest error hath happened to the great damage of the said John I. Adams, H. Renaud, Jay L. Adams, and Edward C. Adams, copartners with the firm-name of John I. Adams & Co., as by their complaint appears: We being willing that the errors, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 19th day of March, in the year of our Lord one thousand eight hundred and eighty.

34 [SEAL.] GEORGE E. WENTWORTH,
Clerk of the Circuit Court for the Northern District of Florida.

(Indorsed:) United States circuit court, fifth judicial circuit, northern district of Florida. John I. Adams & Co. v. A. C. Conn. Writ of error. Issued March 19th, 1880.

35 The United States of America to Adna C. Conn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Florida, at Pensacola, wherein John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the firm-name of John I. Adams & Co., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

36, 37 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of March, in the year of our Lord one thousand eight hundred and eighty.

THOMAS SETTLE,
Judge of District Court for Northern District of Florida, sitting as Judge of the Circuit Court for said District.

[SEAL.] Attest: GEO. E. WENTWORTH,
Clerk.

Office clerk United States circuit court, fifth judicial circuit, northern district of Florida, at Pensacola.

On this thirteenth day of July, in the year of our Lord one thousand eight hundred and eighty, personally appeared before me the subscriber, William Fisher, and made oath that he delivered a true copy of the within citation to Richard L. Campbell, attorney of record for Adna C. Conn.

WM. FISHER.

Sworn to and subscribed before me this 30th day of July, A. D. 1880.

[SEAL.] GEO. E. WENTWORTH,
Clerk.

38 (Indorsed:) John I. Adams & Co., vs. Adna C. Conn. Citation. Filed March 19th, 1880. Geo. E. Wentworth, clerk.

39 I, George E. Wentworth, clerk of the United States circuit court, fifth judicial circuit, northern district of Florida, at Pensacola, Florida, do hereby certify that the foregoing pages, numbered from one to thirty-eight, inclusive, contain a true and correct copy of the transcript filed in this court from the circuit court of Escambia County, Florida, in a cause wherein John I. Adams & Co. are plaintiffs and Adna C. Conn is defendant, and they also contain a true copy of all papers filed and proceedings had in this court in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Pensacola, Florida, this thirty-first day of July, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] GEORGE E. WENTWORTH,
Clerk.

(Indorsement on cover:) No. 122. John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the firm-name of John I. Adams & Company, plaintiffs in error, vs. Adna C. Conn. N. Florida C. C. U. S. Filed 15th October, 1880.

109-371

OFFICE SUPREME COURT U.S.
FILED
NOV 7 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 121.

WILLIAM FLASH, JOHN A. LEWIS, JAMES A. GIRDNER, and LYDELL A. SAXON, copartners under the firm-name of FLASH, LEWIS & CO., Plaintiffs in Error,

vs.

ADNA C. CONN, Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Florida.

BRIEF FOR PLAINTIFFS IN ERROR.

E. A. PERRY,
For Plaintiffs in Error.

THOMAS McGILL & CO., PRINTERS, WASHINGTON, D.C.

Office clerk United States circuit court, fifth judicial circuit, northern district of Florida, at Pensacola.

On this thirteenth day of July, in the year of our Lord one thousand eight hundred and eighty, personally appeared before me the subscriber, William Fisher, and made oath that he delivered a true copy of the within citation to Richard L. Campbell, attorney of record for Adna C. Conn.

WM. FISHER.

Sworn to and subscribed before me this 30th day of July, A. D. 1880.

[SEAL.] GEO. E. WENTWORTH,
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In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Pensacola, Florida, this thirty-first day of July, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] GEORGE E. WENTWORTH,
Clerk.

(Indorsement on cover:) No. 122. John I. Adams, William H. Renaud, Jay L. Adams, and Edward C. Adams, copartners under the firm-name of John I. Adams & Company, plaintiffs in error, vs. Adna C. Conn. N. Florida C. C. U. S. Filed 15th October, 1880.

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WILLIAM FLASH, JOHN A. LEWIS, JAMES A. GIRDNER, and LYDELL A. SAXON, copartners under the firm-name of FLASH, LEWIS & CO., Plaintiffs in Error,

vs.

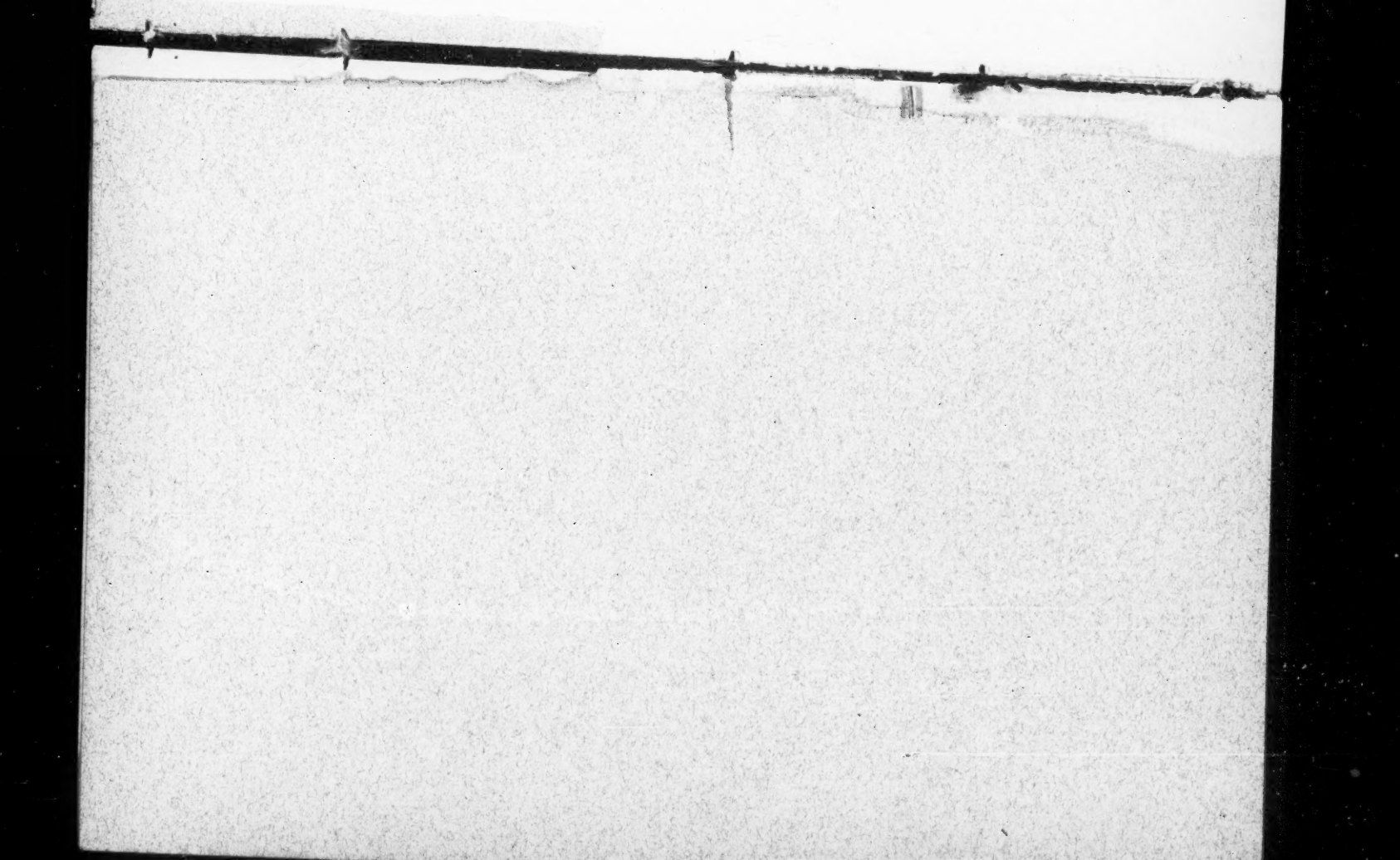
ADNA C. CONN, Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Florida.

BRIEF FOR PLAINTIFFS IN ERROR.

E. A. PERRY,
For Plaintiffs in Error.

THOMAS McGILL & CO., PRINTERS, WASHINGTON, D.C.



Supreme Court of the United States.

No. 121.

WILLIAM FLASH, JOHN A. LEWIS, JAMES A. GIRDNER; AND LYDELL A. SAXON, COPARTNERS UNDER THE FIRM-NAME OF FLASH, LEWIS & CO., PLAINTIFFS IN ERROR,

vs.

ADNA C. CONN, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Florida.

STATEMENT OF FACTS AND BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

STATEMENT.

Prior to 1874 the defendant was a stockholder in the Pensacola Lumber Company, an association formed in the State of New York under the provisions of the act of the Legislature of that State authorizing the formation of corporations for manufacturing purposes, which act, in sections 10 and 11, prescribes what is necessary to be done before the stockholders can be relieved of personal liability for the debts of the association. Thus it provides in section 10 that—

"All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section."

And in section 11, that—

"The president and a majority of the trustees, within thirty days after the payment of the last instalment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees; and they shall within the said thirty days record the same in the office of the county clerk of the county wherein the business of the said company is carried on."

And in section 24 that—

"No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder * * * until an execution against the company shall have been returned unsatisfied in whole or in part."

The foregoing are the only sections of the act involved in this case.

But to aid in properly understanding the distinction between the liability of *stockholders* from which they have never been relieved and the liability *imposed* upon officers as a penalty for omissions or commissions by them, there are also printed here several other sections.

Section 12 of the same act provides that—

"Every such company shall, within twenty days from the first day of January, if a year from the time of the filing of the certificate of incorporation shall then have expired, and if so long a time shall not have expired, then within twenty days from the first day of January in each year after the expiration of a year from the time of filing such certificate, make a report, which shall be published in some newspaper published in the town, city, or village, or, if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of the company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." * * *

Section 13 provides that—

"If the trustees of any such company shall declare and pay any dividend when the company is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the company then existing and for all that shall be thereafter contracted while they shall respectively continue in office; provided, that if any of the trustees shall object to the declaring of such dividend or to the payment of the same, and shall at any time before the time fixed for the payment thereof file a certificate of their objection in writing with the clerk of the company and with the clerk of the county, they shall be exempt from the said liability."

Sec. 14. "Nothing but money shall be considered as payment of any part of the capital stock, and no loan of money shall be made by any such company to any stock-

holder therein; and if any such loan shall be made to a stockholder, the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable to the extent of such loan and interest for all the debts of the company contracted before the repayment of the sum so loaned."

Sec. 15. "If any certificate or report made, or public notice given by the officers of any such company in pursuance of the provisions of this act shall be false in any material representation, all the officers who shall have signed the same knowing it to be false shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

In section 23 it was provided that—

"If the indebtedness of any such company shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of such company."

The said association in the year 1874, and prior thereto, and without complying with sections 10 and 11, were engaged in manufacturing lumber near Pensacola, in the State of Florida—the defendant being the resident manager and the holder of stock to the amount of $75,000, or one-fourth of the capital stock, which was fixed at $300,000—and became indebted to the plaintiffs for supplies in the sum of $5,000 by promissory note or bill of date September 21, 1874, (Record, p. 5,) and the sum of $5,946.20 by another promissory note or bill of date September 21, 1874, (Record, p. 6,) both made and payable in New York, and in the further sum of $2,646.67 by account stated. Upon which notes and account the plaintiffs instituted suit in the Circuit Court of the State of Florida, in Escambia county, against said Pensacola Lumber Company, and on the 15th day of March, 1875, recovered judgment for the sum of $14,120.50. But said company being adjudicated a bankrupt by the District Court of the United States for the

southern district of New York, and the property of the company having been sold under the order of the said District Court, and the proceeds not more than paying the costs and expenses of the bankrupt proceedings, the execution issued upon plaintiffs' judgment was returned wholly unsatisfied.

Thereupon, on the 27th of January, 1876, the plaintiffs instituted this suit against the defendant upon said notes and account in the Circuit Court of the State of Florida for Escambia county, and in their declaration (Record, p. 2) set forth such facts as showed the individual liability of this defendant to the creditors of the Pensacola Lumber Company to the amount of $75,000, and such facts as showed compliance with the requirements of section 24, and that these plaintiffs were entitled to resort to such liability for the payment of said notes and account.

To this declaration defendant demurred; the ground taken by him being that the courts of Florida had no jurisdiction to enforce defendant's liability; it being contended that the liability was a penalty, and one that the Florida courts could not enforce.

Upon this demurrer the Circuit Court of the State, on the 6th day of October, 1877, gave its judgment against the plaintiffs, sustaining the demurrer principally upon the authority of the case of Halsey *v.* McLean, decided by the Supreme Court of Massachusetts and reported in 12 Allen.

The plaintiffs thereupon, on the 6th day of November, 1877, sued out their writ of error from the Supreme Court of the State to said Circuit Court.

The case was heard in the Supreme Court of Florida at its January term, 1878, and that court, after a full consideration of the facts, the law and the authorities, reversed the judgment of the Circuit Court of the State, and held that the declaration did state such facts as constituted a cause of action cognizable by the courts of Florida—that the courts of Florida could enforce the liability of the de-

fendant; and the said Supreme Court by its judgment and mandate filed April 11th, 1878, (Record, p. 11,) to the Circuit Court, commanded that judgment be entered in the court below in favor of the plaintiffs upon the demurrer, which was accordingly done. The opinion of the Supreme Court of the State of Florida and its judgment is reported in 16 Fla., 328, and is printed as an appendix hereto.

The defendant applied for and obtained leave to plead to the plaintiffs' declaration within thirty days from the 18th of July, 1878.

On the 16th of August, 1878, the defendant filed in said Circuit Court of the State five pleas. (Record, pp. 13–14.)

On the 28th of August, 1878, the plaintiffs demurred to the 1st, 2d, and 4th pleas, replied to the 3d and 5th, and on the same day gave notice of the hearing before the judge of the court of the demurrers, to be had on the 2d day of September, 1878, upon which day the defendant filed petition and bond for removal of the case to the Circuit Court of the United States for the northern district of Florida. (Record, p. 15.)

Again, on the 19th of February, defendant filed another petition and bond for removal to said United States court, and obtained from the judge of the Circuit Court of the State an order of removal. (R., p. 18.)

In the Circuit Court of the United States for the northern district of Florida, to which the writ of error was directed, which brings the case before this court, the defendant filed on March 3d, 1879, his rejoinder to plaintiffs' replication to the defendant's third plea, and on March 6th, 1879, filed his sixth plea. To which rejoinder and sixth plea plaintiffs demurred, and the case was, March 15, 1879, heard in the court below upon the plaintiffs' demurrers to all of the defendant's pleadings, (Record, p. 21,) and the court on the 18th of March, 1880, without considering in any manner defendant's pleadings, determined that plaintiffs' declaration was insufficient at law, and ren-

dered its judgment dismissing plaintiffs' suit. Whereupon the plaintiffs sued out their writ of error from this court.

They assign errors as follows:

I. They say the Court below erred in holding that it had the power to review the decision and reverse the judgment of the Supreme Court of the State rendered in this case prior to its removal.

II. That if said Court had such power it erred in sustaining the demurrer to the declaration and dismissing plaintiffs' suit.

ARGUMENT.

I.

It was not competent for the Circuit Court to review the decision and reverse the judgment of the Supreme Court of the State rendered and entered in this cause prior to its removal.

Referring to the language of the sixth section of the act of Congress of March 3d, 1875, quoted by the learned Court, (Record, p. 27,) "that the Circuit Court of the United States shall in all suits removed under the provisions of this act proceed therein as if the suit had been originally commenced in said Circuit Court and the same proceedings had been taken in such suit in said Circuit Court as shall have been had therein in said State court prior to its removal," it is with great respect suggested that by the "State court" is meant the State court from which the case has been removed—that is, the State Circuit Court, and not the State Supreme Court, by which the law of the case had been settled prior to its removal.

As the purpose of the act authorizing removals was not to give the Circuit Court any revisory power over the proceedings of the State court from which the cause is re-

moved, it would seem that the Circuit Court of the United States could not, upon the removal of a cause, reverse, revise, or review any matter passed upon by the *nisi prius* State court prior to removal.

In the case of Brooks *v.* Farwell, the Circuit Court of the United States for the district of Colorado held that questions passed upon by the *nisi prius* State court from which a case is removed cannot be reviewed upon the removal of the cause to the Circuit Court.

Referring to a question which had been thus passed upon prior to removal, that Court says:

"That being decided there cannot be reviewed or in any matter set aside in this court. We do not on the removal of a cause from a court of the State review or attempt to reverse any proceedings that may have been had there before the removal of the cause into this court. As to all questions that are passed upon in the State court before the removal of the cause, they are fully and finally determined so far as this court is concerned, and can only be reviewed in the Supreme Court of the United States, if there be error in them."

4 Federal Reporter, 166–7.

To like effect is the case of Smith *v.* Schwed, decided by the Circuit Court for the western district of Missouri. That Court, referring to a ruling of the *nisi prius* State court made prior to removal, says:

"Whether that ruling was correct or not I will not inquire, because this court is not called upon to review the orders and rulings made by the State court in the progress of the cause before the removal."

6 Federal Reporter, 455–6.

Wertheim & Gompertz *v.* Continental Railway and Trust Co., 11 Fed. Reporter, 689.

Sayer et al. *v.* La Salle & Peru Gas Light and Coke Co., 9 Bissell, 372.

Also bearing upon respect for proceedings pending in Supreme Court of a State.

The Williams Mower and Reaper Co. *v.* Raynor, 7 Ib., 245–7.

Much less could the Circuit Court of the United States review, reverse, and set aside the decision and judgment of the Supreme Court of the State made and entered in this cause and incorporated into its record prior to the removal. Upon this question this Court has settled the law, for it held, in Duncan *v.* Gehan, that—

"The Circuit Court, when a transfer is effected, *takes the case in the condition it was when the State court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State court would have had if the suit had remained there.* It takes the case up where the State court left it off."

101 U. S., 812.

If the suit had remained in the State court, would that court have had power to reverse, revise, or review the judgment of the Supreme Court upon the demurrer?

The question raised by the demurrer to the declaration, "had been finally settled by the judgment of the Supreme Court of the State on appeal. That was no longer an open question between the parties to that litigation."

Ib., 813.

The case of Spring Co. *v.* Knowlton is in nowise *contra*, for in that case the action of the Court of Appeals nowhere appeared in the record before this Court.

103 U. S., 61.

The case of King *v.* Worthington approves and affirms the doctrine laid down in Duncan *v.* Gehan as settled law.

104 U. S., 50.

The question raised by the demurrer and elaborately treated and deliberately passed on by the Supreme Court of the State was one peculiarly within its province to determine. It was a question of inter-state comity; a question as to what extent the law of comity shall be recognized by the courts of Florida; a question which, in the absence of legislation upon the subject, is in no small degree to be determined by the judicial discretion of the courts of the State. This involved a "rule of decision and not a question of jurisdiction."

Holmes *v.* Remsen, 4 John. Ch., 471.

This Court says, in The Bank of Augusta *v.* Earle:

"It is truly said, in Story's Conflict of Laws, 37, that 'in the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests.'"

13 Peters, 589.

What tribunal more competent to judge whether or not foreign laws are repugnant to the policy or prejudicial to the interests of a State than its own Supreme Court?

"The extent of comity—that is, the degree of force and obligation the laws of one country have in another—depends solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent."

Story's Conflict of Laws, sec. 23.

The extent is broad or narrow according to the policy of the particular State.

Ib., 38.

In the absence of legislation upon the subject, *practically it is a comity of courts;* for the exercise of comity in admitting or restraining the operation of a foreign law rests un-

avoidably in a sound judicial discretion, dictated by the circumstances in the case.

2 Kent's Com., 458, note.

It seems praiseworthy in the courts of a State to heed the advice of this Court and adopt that "greater degree of comity and friendship" so strongly urged upon the States in the case of The Bank of Augusta *v.* Earle.

13 Peters, 519, 539, 589.

II.

If it was competent for the Circuit Court to review and set aside the proceedings and reverse the judgment of the Supreme Court of the State, it should not have done so, but should have affirmed such Supreme Court's judgment, sustained the declaration, and entertained the plaintiffs' suit.

In the courts below and in the Supreme Court of the State much stress was laid on the fact that the liability here sought to be enforced is a statute liability instead of one known to the common law.

This Court, in Dennick *v.* Central R. R. Co. of New Jersey, has given to the law of comity an extent which makes it immaterial whether the right of action has become fixed and a liability incurred by the common law, or by the statute law of another State than that in which the liability is sought to be enforced.

103 U. S., 11.

The law, as in this case laid down, clearly establishes that defendant's liability can as well be enforced in Florida as in New York, under the statute of which State his liability is fixed. This Court says:

"It is difficult to understand how the nature of the remedy, or the *jurisdiction of the courts* to enforce it, is in

any manner dependent on the question whether it is a statutory right or a common law right."

Ib., 17.

"Whenever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties.

"We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York."

Unquestionably this defendant is legally liable in New York. His liability is fixed by the law of New York; and "is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law?"

Ib., 18.

With great deference, it is suggested that the Circuit Court did not sufficiently consider the distinction between the liability *left upon a stockholder* under section 10 and the liability *imposed upon an officer* for failing to perform a duty, as in section 12, or for doing a wrongful act, as in sections 13, 14, 15, or 23.

In the case of the stockholder, he was never relieved from the liability; consequently how can it be said to have been imposed upon him? The non-compliance with the requirement necessary to relieve him *left* but did not *impose* upon him the liability.

In the case of the officers their non-action or action imposed upon them a liability that had no pre-existence.

The statute, sections 10 and 11, provided a way in which defendant and associates might have relieved themselves of individual liability, and have transferred it absolutely

and finally upon the company, but, as to these sections, does not create any new liability—merely keeping alive, until certain acts are done; a part of the liability which would have rested upon them as associates in business, without any steps in the direction of becoming a perfect corporation.

The courts of New York—the most competent authority to construe New York statutes—clearly recognize the distinction.

Thus the courts of that State hold that—

"A personal liability for debts of a corporation, imposed by its charter upon its *officers* for failing to perform a duty with which they are charged, is *quasi*-penal, and therefore the courts of this State have no jurisdiction to enforce such liability when the charter creating it was granted by another State; but the personal liability of the *stockholders* by statute arises out of their original liability, if they had not been exempted therefrom by such statute; an action against them is therefore upon their contract in a qualified corporate capacity."

Bird *v.* Hayden, 1 Robertson, 383.

It is by the courts of New York well settled that the stockholder's liability, such as in this case is sought to be enforced, is not in the nature of a penalty, but is to be enforced as a contract.

Allen *v.* Sewall, 2 Wend., 338.
Moss *v.* Oakley, 2 Hill, 265.
Bailey *v.* Bancker, 3 Hill, 188.
Harger *v.* McCullough, 2 Denio, 119.
Ex parte Van Riper, 20 Wend., 614.
Corning *v.* McCullough, 1 Coms., 47.

In Halsey *v.* McLean, it would seem that the court was not required to determine the nature of the liability under section 10. The auditor or referee found the defendant in

that case liable as trustee under section 12, and the court below confirmed such finding. The Supreme Court, without construing section 10, could well have reversed the judgment, because the liability under section 12 is held by the courts of New York to be, what it unquestionably is, in the nature of a penalty; and also because the contingencies had not happened which made it obligatory upon the defendant to pay. The construction of section 10, then, would seem to be nothing more than the opinion of the distinguished members of that court upon a statute of the State of New York.

Even had the consideration of the nature of the liability as a stockholder under section 10 been involved in the case, it is the construction placed upon the statute, not by the courts of Massachusetts, but by the courts of New York, that enters into and forms part of the contract.

The courts in Bank *v.* Price, 33 Md., 493, and in Derrickson *v.* Smith, 3 Dutch., 169, admit the law to be settled by the New York courts as claimed by the plaintiffs here.

The statute and the New York courts' construction of it, and the fact that the defendant was acting in an inchoate "qualified corporate capacity" which made it obligatory upon him, upon the plaintiff's complying with section 24, to pay debts contracted in the name of the inchoate corporation, to the amount of $75,000, entered into the contract between the parties and fixed and limited the defendant's liability and the plaintiffs' rights.

Has the part of the contract comprised in the statute any less force than if it had been attached literally and bodily to every contract made by defendant and his associates?

The provision that the plaintiffs must first obtain judgment against the company does not affect their rights to the personal liability of the defendant stockholder. Nor does it prevent the liability of the defendant stockholder from attaching and becoming perfect on consummation of

the contract of the creditors, the plaintiffs, with the company.

It simply defers the remedy.

Corning *v.* McCullough, 1 Coms., 47.
Harger *v.* McCullough, 2 Denio, 119–124.
Moss *v.* Oakley, 2 Hill, 265–270.
Angel & Ames on Corp., sec. 611, note 5.

Consider defendant in the light of a guarantor. He promised to pay debts contracted by the company to extent of $75,000, if such debts were not paid by the company. Is not that a contract which the courts of any State ought to enforce?

It is no answer to say the defendant's liability was limited and conditional under the laws of New York. Story's Conflict of Laws, sections 263, 322, 322[b]. If the contract created a personal liability in New York, that liability follows the contract and person everywhere. *Ib.*, sec. 322. Consider the case of an endorser. *Ib.*, sec. 316[b]. A limited or special partnership. *Ib.*, sec. 320[a]. And whether a partner is liable *in solido* or for a proportionate share. *Ib.*, sec. 222.

When described as an original liability by the New York courts, the term "original" is used in contradistinction to the term "imposed;" and if it existed from the first it is, as held by the New York courts, *original* and not imposed as a penalty or forfeiture. How can it be said that a liability which existed from the beginning was imposed as a penalty?

It will be noticed that the notes were made and were to be paid in New York. The law of New York, then, is to govern "as to the nature, the obligation, and the interpretation of the contract." Story's Conflict of Laws, sec. 263.

This Court, speaking of the law of comity, says: "The cases of contracts made in a foreign country are familiar

examples, and courts of justice have always expounded and executed them according to the laws of the place in which they were made, provided that law was not repugnant to the laws or policy of their own country. (13 Peters, 589.)

The Supreme Court of Florida in this case has determined the New York law not to be repugnant to the laws or policy of the State of Florida.

Parties contracting with defendant and his associates are presumed to have known the anomalous character in which defendant and associates were contracting, and to have contracted with them in that character.

The statute is a part of such contract—a part which at different times might be of different force and effect; but as to the case at bar, it appears that when the contract was made between the plaintiffs and defendant and associates the latter were individually liable for the promises made in the name of the company.

As to the liability of officers under other sections—for instance, section 12—that is a liability arising after the exemption from individual liability had once been complete; and it may well be, as it is, considered a liability imposed by statute and in the nature of a penalty for a default, for the liability did not exist until the default; but as to the liability sought to be enforced here, the defendant was, in the language of Judge Bronson, in Corning *v.* McCullough, cited, "answerable as an original debtor," and continued to be so answerable until he, by his agents or officers, should comply with the requirements of section 11, and thus relieve himself from such liability by substituting in his place a complete artificial person to assume the liability.

In the court below defendant claimed that by section 2 of the act he and his associates were clothed with the full character and attributes of a corporation, including an exemption from individual liability—one of the principal

common law attributes of a corporation, (not, however, an essential attribute; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall., 566,)—and that section 10 imposed upon them liability for the failure of the officers to do a certain thing. This claim is fully answered by the New York Court of Appeals, (1 Coms., 57–8,) and by considering that to relieve themselves from a liability from which they had never been exempt was, like their entering into an association, a privilege allowed, but not an act required for the protection of those dealing with them, the non-performance of which *created* or *imposed* upon them a liability which did not pre-exist.

The statute simply withheld from the stockholders a part of the protection arising from incorporation until certain things should be done.

The learned court below in its opinion suggested that "the debt on which it is sought to charge the stockholders individually may have been contracted, as it appears to have been in this case, after the default of the officers of the company, which is the basis of the liability."

It is respectfully submitted that the defendant is estopped from claiming that by failure of the company to comply with section 11 within two years and thirty days he can be in anywise benefited.

The only necessity for complying with the provisions of sections 10 and 11 as to time, or in fact ever, was to prevent proceedings in behalf of the State of New York to put an end to the company's corporate functions.

The company, though not a valid corporation in point of law, could, as it did, carry on its enterprises, have its day in court, and divide its revenue among the holders of the shares of the capital stock until the State interposed and asked that it be dissolved.

Eaton *v.* Aspinwall, 19 N. Y., 119–121–2.

In no sense can it be said that the gist of this action is

the failure of the officers to file the certificate required to complete the incorporation. As declared by the New York Court of Appeals, the suit has "for its object the recovery of a debt for goods sold to a company, of which the defendant was a member and personally liable for the payment of its debts," (proportionate to his interests in the company and consequent benefit from the use of plaintiffs' goods,) "and which action, in no just sense of the term, partakes of the character of either forfeiture or penalty."

1 Coms., 65.

The plaintiffs sold their goods to defendant and associates on the faith of the surety set forth in the statute as part of the contract, and they trusted as well to the personal liability of defendant as to the responsibility of the company for fulfillment of the contract.

Ibid., 55.

The evident purpose of section 10 was to preserve *this* security to those dealing with the company until the company should create, with notice to those dealing with them, a fund out of which creditors could satisfy their claim.

In considering the issue of law raised by a demurrer to the declaration there can be no assumption that any of the capital stock has ever been paid in. When the law requires that the doing of any act shall be evidenced in a particular way, the denial of such evidence leaves no room for a presumption that the act had been done. On the other hand, the presumption is that the stock was never paid in; for, had it been, it is presumed the company, through its officers, would have taken the necessary steps to make it known to the world and to relieve themselves from individual liability. It is safe to assume, then, that the plaintiffs sold their goods altogether upon the faith of the individual liability of the members.

It is contended that for the enforcement of the liability

regulations are prescribed unknown to the common law. No more than in any other case of contract where the duty to perform—to execute a liability on one side, and the right to demand the performance and enforce the liability under the contract on the other side, is deferred till the happening of certain contingencies. This is all a part of the contract. As in case of a guaranty that a certain debt will be paid where it enters into the contract that the creditor shall first exhaust his remedy against the principal. Take the contract of insurance: The insurer contracts to pay upon the happening of certain contingencies, for instance, the burning of the property insured; the making of the proofs by the insured; the lapse of the sixty days thereafter as the contract may provide—then the making demand or instituting suit within a specified time. The insurer was bound by his contract from the time it was made; his liability under it was fixed at the making of the contract, and upon the happening of the contingencies his obligation and liability can be enforced.

A requirement in no respect different in character was that considered in Van Riper, *ex parte*, cited *supra*, the requirement in the charter that demand should be made at the bank during the usual hours of business.

These are all matters connected with and qualifying and limiting the contract, as are the limitations in section 24.

In the case of Riddlebarger *v.* Hartford Insurance Company there was, as here, a limitation prescribed by the contract, and it was argued, as it has been argued in this case, that the limitation contravenes the policy and statutes of the State and cannot be enforced. But this Court took a different view and enforced it as part of the contract. (7 Wall., 386.)

If it be true that the courts of Florida, which declare their competency and willingness to do so, are not to be allowed to enforce a liability upon the faith of which, as we have seen, the defendant obtained plaintiffs' goods,

then, indeed, does this case present a strange anomaly, and the law works no little hardship.

By comity, the foreign law must be recognized and enforced so far as it gives rights, powers and privileges to foreign corporations to come to a State and contract and enforce its contracts in her courts; but when that same law is invoked to protect the rights of parties who contract with the foreign corporation upon their faith in such foreign law, they are told it is not a law within the comity of States. It and its members are bound by its contracts at home; in Florida, although parties contracting with it are as fully bound as though they contracted with it in New York, yet it and its members are not bound.

This defendant, by comity, is authorized to act in Florida in the capacity which is given to him by New York laws, and in that character obtains plaintiffs' goods, upon the pretense and showing of an individual liability. He comes into the State holding out, by not filing the certificate required by section 11, that he is liable for his contracts as he would be in New York, thus establishing a credit which enables him to build up a property in his character as an inchoate corporation. When sued in that character the property is, through the forms of the bankrupt law, transferred to him as a natural person; and when his creditors seek to enforce the liability upon the credit of which the property was created, they are told it is not the "policy" or to the "interest" of Florida that its courts should enforce contracts and justice in behalf of its citizens, which, if we reverse the position and circumstances, we see from 20 Wend., 614, 1 Rob., 383, and other cases cited, New York would enforce in behalf of its citizens against citizens of Florida.

Especial attention is invited to the judgment and opinion of the Supreme Court of Florida in this case.

If it shall be held that the judgment was not a final adjudication of the question raised by the demurrer to the

declaration and passed upon, so that "that was no longer an open question between the parties to that litigation," then the plaintiffs in error confidently rely upon the opinion and that court's careful examination and consideration of all the authorities produced in behalf of demurrant, as an authority of much more than usual weight to sustain the second assignment of error.

E. A. PERRY,
For Plaintiffs in Error.

APPENDIX.

FLASH, LEWIS & CO., PLAINTIFFS IN ERROR, VS. ADNA C. CONN, DEFENDANT IN ERROR, (16 Fla., 428.)

Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manufacturing purposes, &c., passed by the Legislature of New York, which provides, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall within thirty days after the payment of the last instalment of the capital stock make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or act of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed. The courts of this State may enforce such contracts.

WRIT OF ERROR to the Circuit Court for Escambia county.

The declaration alleges that the defendant, on and before the first day of April, 1874, was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York under the provisions of the act of the Legislature of that State, passed February 17, 1848, entitled "An act to authorize the formation of a corporation for manufacturing, mining, mechanical, chemical," &c., purposes and the various amendments thereof; and that the defendant being such stockholder, and holding $75,000 of stock, or one-fourth of the stock which was fixed at $300,000; and the said company doing business and having an agent and of-

fice in Escambia county; and the said company being in debt to the plaintiffs in the sum of $5,000 by promissory note of date September 21, 1874, and the sum of $5,946.20 by another promissory note of date September 21, 1874, and the further sum of $2,646.47 by account stated, the said plaintiffs, on the 16th day of February, 1874, instituted their suit against the said company in the Circuit Court to recover the sums due by said promissory notes and account, and the interest and costs; and on the 15th day of March, 1875, the plaintiffs recovered judgment in said Circuit Court against the said company for the sum of $14,120.50, together with the costs of said suit; that by reason of the said company being adjudicated a bankrupt by the District Court of the United States for the northern district of New York in 1875, the plaintiffs were prevented from taking any of the property of the said company under execution in satisfaction of said judgment; that upon said judgment execution was duly issued, but returned by the sheriff of said county wholly unsatisfied; that the property of said company has been sold by order of said Bankrupt Court, and that the proceeds of said sale will not more than pay the costs and expenses of the bankrupt proceedings and of the assignee in bankruptcy, leaving nothing to be applied to the satisfaction of said judgment, or to be paid to the plaintiffs and other creditors, and that said judgment has not been, and cannot be, satisfied either in whole or in part out of the assets of said company; that by the provisions of said act of the Legislature of the State of New York all the stockholders of said company are severally individually liable to the creditors of the company to the amount of stock held by them respectively, for all debts and contracts made by said company, until the whole amount of capital stock fixed and limited by such company shall have been paid, and a certificate thereof shall have been made, signed, and sworn to by the president and a majority of the trustees, and recorded in the office of the county clerk of the county wherein the business of the said company is carried on; and that the said company failed to comply with the said provisions of said act, and did not, by its president and a majority of its trustees, make, sign, swear to, and record such certificate, either in the county of New York, the county in which the operations of said company were, by their articles, to be carried on and their principal business

done, or in the county of Escambia, Florida, in which said company did business, or in anywise as required by said act to exempt defendant; wherefore the said defendant became, and is, liable to the said plaintiffs for the said debt and said contract made by said company, and the said plaintiffs claim $28,000. The other facts are stated in the opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court.

Plaintiffs in error sued defendant, and alleged that defendant was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York under the provisions of an act of the Legislature of that State entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," and the amendments thereto; that the defendant is a stockholder in said company, holding stock to the amount of $75,000, being one-fourth of the entire amount of stock of said company; that said company did business and had an agent and office in Escambia county, Florida; that the company in 1874 was indebted to the plaintiffs in certain notes and in account stated; that in March, 1875, they recovered a judgment upon such indebtedness in said Escambia county for upwards of fourteen thousand dollars, upon which judgment execution was issued and duly returned unsatisfied for want of property on which to levy; that by the provisions of said act of the Legislature all the stockholders of said company are severally individually liable to the creditors of said company to the amount of stock severally held by them for its debts until the whole amount of the capital stock shall have been paid, and a certificate thereof shall have been made, signed, and sworn to by the president and a majority of the trustees of said company, and recorded in the office of the county clerk of the county wherein the business of said company is carried on, and the declaration avers that the president and a majority of the trustees of said company did not make, sign, swear to and record such certificate as required by said act, to exempt the defendant from liability, wherefore the said defendant became liable to the said plaintiffs for said debt and the contracts made by said company, &c.

To the declaration the defendant demurred—first, that it does not set forth any cause of action; second, that it does

not set forth a cause of action cognizable by this court. The court sustained the demurrer.

The sections of the act of the Legislature of New York referred to in the pleadings and upon the argument of the cause are as follows:

"SEC. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company, in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section:

"SEC. 11. The president and a majority of the trustees, within thirty days after the payment of the last instalment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees; and they shall, within the said thirty days, record the same in the office of the county clerk of the county wherein the business of the said company is carried on."

"SEC. 24. No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against said company within one year after the debt shall become due; and no suit shall be brought against any stockholder * * until an execution against the company shall have been returned unsatisfied in whole or in part."

The demurrant insists that "official neglect of a duty imposed by the laws of another State is the gist of the case against the defendant," as the case is stated in the declaration, and says the 10th section attaches to the components of the corporation certain individual liabilities. "First, *stockholders* are severally individually liable to the amount of each one's stock, until the entire amount of the capital stock of the corporation is paid in;" and "second, stockholders are so liable, although the entire capital stock be paid in, *upon the failure of the officers* to file the required certificate."

The position is that the liability is one created by the statute of another State, and is one *imposed by* such statute in consequence of the failure of certain officers to perform a required duty, and is therefore a *penalty* prescribed by such foreign statute; and that the courts of this State cannot enforce such penal statutes. If this deduction is correct, that this liability is a penalty, and not arising strictly out of contract, we are not prepared to deny the demurrant's conclusion.

The case of Bird *v.* Hayden, (1 Robertson, N. Y., 383,) cited by defendant's counsel, was a suit in New York against a director of a manufacturing corporation created under the laws of Massachusetts. A provision of the act required that the officers should annually make and file a certain certificate of the condition of the company, and *in case of neglect* the officers were declared, by the act, to be jointly and severally liable for the payment of the debts of the corporation created after such neglect and before the filing of the certificate. The court held that actions to recover penalties created by the statutes of other States, being local, are not cognizable by the courts of New York. (14 John., 338; 17 John., 4; Story Confl. Laws, § 620-621.) The court says there is nothing in the act of incorporation of this company which rendered the directors or stockholders liable in the first instance for the debts of the company, as there is in the general banking law and other laws of that State. There is no personal liability if the company fails to pay, and hence there is no right of action against the stockholders for any debt contracted by the company so long as the officers discharge the duties imposed upon them by law.

It is only upon this neglect or refusal to perform their duty that they render themselves liable. The court adds: "The personal liability of stockholders, where they are made liable by the charter or act of the Legislature, is from the *inception of the debt*. They became originally liable, and the happening of no event is necessary to charge them. The company is invested with a qualified corporate capacity, but no immunity or exemption from personal liability for the debts of the company. In these cases, in judgment of law, the debt is contracted upon the terms and security authorized by the statute, and the creditor having exhausted his efforts to collect from the company, may

resort to a common law action directly to the stockholders, not to recover a penalty or forfeiture, nor upon a cause of action in the nature of a forfeiture, but to recover a simple contract debt, for which he was liable at the time it was contracted. The action in *that* case is not *upon* the statute, and a mere reference to it is all that is necessary to show the connection of the stockholders therewith and the liability it creates."

But in the case before it the court holds that the personal liability for the neglect or refusal to perform a duty was in the nature of a penalty or punishment, and hence no action could be maintained therefor in the courts of New York.

Counsel for defendant says "he is not liable as a co-partner, yet such would be the shape of the liability if it came from the common law," and cites Woodruff & Beach Iron Works *v.* Chittenden, 4 Bosw., 417. There it is true the court say the stockholders are not partners; but the court was merely remarking upon the position assumed, that the plaintiff and defendants in the case were *all* stockholders, with a limited liability, whereas as to partners there was no limit; and in that case a judgment against a stockholder in a manufacturing corporation was recovered by a creditor of the company, for the use of other stockholders, limited by the amount of his stock. The suit was not brought to recover a penalty, and the court held that the liability was not in the nature of a penalty. In Eaton *v.* Aspinwall, (19 N. Y., 119,) the court says the "credit was given upon the faith not only of the liability of the corporation as such, but ultimately of the several stockholders of its capital." Weeks *v.* Love (50 N. Y.) merely decides that creditors may sue severally, and holds that when a stockholder has paid debts of the corporation equal to the amount of his stock, he is relieved from further liability. It is also remarked by the court that "the liability is created for the security of creditors."

The Merchants' Bank *v.* Bliss (1 Rob., 391) was an action brought to charge the trustees, not because of any original liability for the debts of the corporation, but for a neglect of duty, whereby they were subject to a forfeiture, and this was properly held to be a penal action as for an offense.

In Derrickson *v.* Smith (3 Dutcher, N. J., 166) it was held that an action for a liability under section 12 of the New York manufacturing incorporation act, being a liability *im-*

posed by statute for the *neglect* of the defendant as a trustee to make certain reports, was a proceeding to enforce a penalty prescribed by the Legislature of another State, and the court refused to maintain the suit. The court, however, draws the distinction very plainly between such a suit and one against the individual corporators who are held to be jointly and severally liable for the debts of the corporation. In *such* case (said Elmer, J.) the stockholders must be considered original parties to the debt, so that their liability attached on the consummation of the contract with the corporation, and so that a provision in the acts requiring creditors first to obtain a judgment against the corporation simply operated to defer the remedy against them until the remedy against the corporation should be exhausted. And Green, C. J., says: "In such case it is held that the stockholders are liable in an original and primary sense like partners, and that their liability is not created by the statute of incorporation. He *assumes* the liability by becoming a member of the corporation. The personal liability of the stockholder to pay the debt is the immediate and necessary consequence of the contract made by the company. It becomes by the terms of the charter his debt, otherwise of the liability which attaches as a consequence of a violation or neglect of a duty prescribed by the statute."

In Corning *v.* McCullough, (1 Com., 47,) the court, speaking of the character of these corporations, says: "It is not a general unqualified incorporation of the company imparting to the stockholders and members composing it, as a legal consequence, an exemption from personal liability for the debts and engagements of the body corporate. It is a legislative grant of a special qualified corporate capacity with adequate plenary powers for the purposes of its institution, but with the personal liability of the stockholders for the debts the company shall contract and the liabilities they shall incur."

And Justice Bronson, concurring, said it has been several times held that the stockholders of this and other like companies stood substantially upon the same footing as to liability as though they had been partners or an unincorporated association; that they were answerable to the creditors of the company as original and principal debtors, though the creditors were first to exhaust their remedy against the corporation. (2 Wend., 338; 20 Ib., 614; 2 Hill, 265;

3 Ib., 188; 2 Denio, 119.) The court, in Corning *v.* McCullough, holds that such liability of a stockholder is not in the nature of a penalty.

The question in Lawler *v.* Burt, (7 Ohio St. R., 340,) was whether a statute making a stockholder liable for the circulating notes unlawfully issued by a company or corporation other than a bank, was a penal statute, and the court held that it was.

It was held in Kirtzer *v.* Woodson, (19 Mo., 327,) that the liability under the Missouri statutes prohibiting an excess of indebtedness over and above the capital stock of an incorporated company, was penal, and not arising out of contract, and a stockholder could not recover from a director.

The suit of Jones *v.* Barlow, (62 N. Y., 202,) was against trustees for a failure to make an annual report, and not upon any original liability of the trustees. The liability was imposed as a penalty and not assumed as a contract. The liability in Hill *v.* Frazier, (22 Penn. St. R., 320,) was for unlawfully declaring a dividend as one of the directors; a penalty for wrong-doing.

In the First National Bank of Plymouth *v.* Price *et al*, (33 Md., 487,) it was held that the liability imposed upon the directors and officers of a Pennsylvania corporation for unlawfully contracting debts beyond the amount of the capital stock, is in the nature of a penalty, and could only be enforced in Pennsylvania. The court holds that the liability does not arise out of contract, and says that while a contract made in one State is enforced in other States agreeably to the law of the State where it is made, it is well settled that no State will enforce penalties imposed by the laws of other States. The court remarks:

"It has been decided by the courts of New York in several cases, and seems now to be there well settled, that where by a statute it is provided that the individual corporators shall be jointly and severally liable for the debts of the corporation, such liability is not in the nature of a penalty, but may be enforced as a contract."

The court in Vermont, Pickering *v.* Fish, (6 Vt., 102,) held that the courts of that State would not take cognizance of an official bond executed in another State for the purpose of enforcing it in a peculiar manner unknown to

the common law, directed by a statute of that State, for the court says:

"It is not a contract originating in the ordinary business transactions of men, created for private and individual purposes, as evidence of private right. If it were such it would be transitory as to the persons of the contracting parties, and would be enforced in any jurisdiction where the legal obligation of contracts is recognized. It is a general rule that courts of all civilized nations will enforce contracts executed in foreign States, where the parties are within their jurisdiction; and for this purpose will have regard to the laws of the place where the contract may be made."

Thus far we have examined all the authorities cited by the defendant in error, in the order in which they are referred to in the argument, excepting the case of Halsey *v.* McLean, (12 Allen, 438.) We cannot take issue with any of these decisions excepting the latter, which, in our judgment, is antagonized and opposed by every other case referred to by either counsel. In that case, the defendant was sued in Massachusetts as a stockholder of a New York company (organized under the same act of the Legislature of New York under which the present suit originated) by a creditor of the company. The court says, referring to the sections of the incorporation act:

"These provisions likewise have been declared by a New York court (4 Bosw., 417) not to render the stockholders chargeable as copartners. The liability for non-payment of the capital stock is limited in the case of each stockholder to an amount equal to his stock; and to an action founded on § 10, it would be a defense available to any shareholder that he had already paid debts to that amount;" and the court was "of the opinion that the liability of stockholders for debts due to laborers, * * qualified, as it is, by the provisions as to the remedy in § 24, must be treated as a part of the statute system of another State, incapable of execution *alieno foro*." The court does not tell us why, if the shareholders are *not* partners, or chargeable as copartners; or why, if the liability is limited to the amount of unpaid capital stock; or why, if the liability is limited to debts contracted to be paid within a specified time, and conditioned upon a suit being first brought against the company within a year after the debt becomes due,—

why it must follow that the contract cannot be executed *alicno foro.*

Suppose the law of New York limits the liability upon civil contracts made in that State to the term of six years from the accruing of the cause of action, is that such a *qualification* of the liability that the courts of another State will not enforce the contract within six years? Or suppose by the law of New York an action cannot be maintained against a surety or guarantor until a recovery against the principal, is that such a qualification of the liability that the courts of another State will not entertain a suit against the surety after judgment against the principal? Or if the liability is limited by statute to a certain pro rata amount of indebtedness, contracted by several individuals, or by a corporation, is that such a qualification that the liability will not be enforced in another State? And yet, if we understand the court in Halsey *v.* McLean, it is the opinion of the court that in either of these cases the statute has so qualified the liability the courts of another State will refuse to enforce it. The court further remarks, that it regards the principles laid down in Derrickson *v.* Smith (15 Gray, 221) as applicable to all the provisions of the New York act, which they examined in that case.

Turning to the case of Derrickson *v.* Smith, we find that the Massachusetts court refused to entertain a suit where the liability arising under the charter of a New Hampshire corporation could be enforced by the law of New Hampshire *only by bill in chancery*, a law which the Massachusetts courts could not recognize as binding upon them, and in the nature of things only valid in New Hampshire, as it prescribed the particular form in which the remedy must be sought, the court holding "that when a statute creates and prescribes a remedy, that remedy is exclusive, and no other can be pursued." We cannot regard the New Hampshire decision as laying down any principle applicable to the case at bar, which will preclude the courts of that State from entertaining this plaintiff's suit. The ruling of the courts of New York, where the company was incorporated, is to the effect that the stockholders are liable by the terms of the act of incorporation, which is the substance of their contract in the first instance, for the debts of the company, not, as insisted by defendant, *upon the failure* of the officers to file their certificate, but are so

liable to the amount of their stock *until* the happening of a certain event, for all the debts contracted to be paid within one year after suit and execution against the company in its corporate capacity. These terms are but *limitations* of the liability which was incurred by the contracting of the debt, and do not create liabilities *depending* upon any other event. A statute of limitation is not a qualification of a contract, so that the liability depends upon the happening of any event, but the event or lapse of time merely relieves against a suit; the right to a remedy ceases to exist. The limitation is for the benefit of the stockholder and a means of relief, and not a condition of liability.

A surety may sometimes demand that legal remedies shall be first exhausted against his principal before he shall be compelled to pay, but this is because the surety is already bound, and not because the liability is not fixed by his contract; *that* is operative already, and dependent upon nothing but its own condition. The stockholder here is a surety of the company of which he is a member, and his liability as a surety is a part of the contract entered into by becoming a member of the company. No event was necessary to charge him as a member except the contracting of a debt to be paid within one year, upon which suit must be brought within one year after the debt is due, and if this is not done he is discharged. This and the amount of his unpaid stock merely limit the personal liability upon the contract.

We have seen by the decision of the courts of New York already cited that the personal liability of the stockholders, when they are made liable by the terms of the charter or act of incorporation, is from the inception of the debt. They are originally liable, and the remedy upon this liability may be enforced after the creditor has exhausted his efforts to collect from the company. (Bird vs. Hayden, 1 Rob.; Eaton vs. Aspinwall, 19 N. Y.; Weeks vs. Love, 50 N. Y.; Derrickson vs. Smith, 3 Dutcher, N. J.; Corning vs. McCullough, 1 Comst.; Bank vs. Price, 33 Md.)

In Van Riper, ex-parte, (20 Wend., 614,) the court say: "The charter does not confine the creditor to any particular remedy. It raises in his favor a debt against an individual, and leaves his remedy to the general methods of the law. This view also answers another objection, that the remedy

given by the charter is local to the State of New Jersey. The charter, in fact, institutes no remedy. It binds Van Riper as a debtor. It raises a debt against him, which may, in its own nature, be enforced wherever the debtor or his property can be found, according to the forms of law at the place where found."

In a suit against a stockholder of the Rossie Galena Company, where, by the charter, the stockholders were, "jointly and severally, personally liable for the payment of all debts or demands contracted by the said corporation," but could not be sued until a judgment had been recovered against the corporation and an execution returned unsatisfied, it is held that the stockholders in their individual as well as their corporate capacity were principal debtors. (Hayer vs. McCullough, 2 Denio, 119; Moss vs. Oakley, 2 Hill, 265; Bailey vs. Baucker, 3 Hill, 188.)

In these cases, as in ex-parte Van Riper, and in Corning vs. McCullough, the individual liability extended to all debts of the company, while in the case at the bar the extent of the liability was limited by the charter to the amount of the capital stock owned by the defendant. In neither case is it apparent that the liability is in the nature of a penalty, and there is as much show of reason for classing it as a penalty in one case as in the other.

The defendant's liability as a stockholder, under the articles of association, clearly rests in contract and not in tort, or dependent upon the conduct of the officers or agents of the company, but only upon the non-payment of the debt by the principal debtor, and limited by the amount of his stock. If he has paid any of the debts of the company, that is matter of defense under his contract.

We discover no substantial objection to the form of the allegation in the declaration. The gist of the action is the indebtedness of the company, the suit and judgment against the company unsatisfied, the amount of the defe dant's stock, and the fact that the liability has not been extinguished by the making and filing of the certificate as prescribed by the articles.

The judgment must be reversed, and judgment entered in favor of the plaintiffs upon the demurrer, and such further proceedings may be had according to law and the practice of the court as the parties may be advised.

104-371

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 121.

WILLIAM FLASH, JOHN A. LEWIS, JAMES A. GIRONER and LYDELL A. SAXON, copartners under the firm-name of FLASH, LEWIS & CO., Plaintiffs in Error,

vs.

ADNA C. CONN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Brief for Defendant in Error.

C. W. JONES,
R. L. CAMPBELL,
MICHAEL L. WOODS,
Of Counsel.

Gibson Bros., Law Printers, Washington, D. C.

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SUPREME COURT U.S.
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JAMES H. McKENNEY, Clerk

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vs.

ADNA C. CONN.

In Error to the Circuit Court of the United States for the Northern District of Florida.

STATEMENT.

The plaintiffs in error, who were the plaintiffs below, instituted this suit in the Circuit Court of Escambia county, State of Florida, on the 27th day of January, 1876. The declaration alleges that the defendant, on or before the first day of April, 1874, was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York under an act of the Legislature of that State, passed February 17th, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, &c., purposes," and the various amendments thereof; that the defendant was the holder of stock in said company to the amount of $75,000, the entire stock of said company being $300,000; that the said company did business and

had an office and an agent in said county of Escambia, State of Florida; that said company, while the defendant was the holder of the stock aforesaid, became largely indebted to the plaintiffs, which indebtedness was evidenced by two promissory notes, one for $5,000, dated September 21, 1874, and one for $5,946.20, of like date, and account stated for $2,646.47, whereupon the plaintiffs, on February 16th, 1875, instituted their suit in the Circuit Court of said Escambia county against the said company to recover the amount due from said company, and on March 15th, 1875, judgment was rendered by said court against said company in favor of plaintiffs for the sum of $14,120.50 and costs; that said company having been adjudged bankrupt by the United States District Court for the southern district of New York in the year 1875, its property could not be taken in execution to satisfy said judgment, nevertheless an execution was issued thereon and returned wholly unsatisfied; that the property of said company had been sold by order of the Bankrupt Court, and its proceeds would not more than pay the costs of the bankrupt proceedings, leaving nothing to be applied to the payment of said judgment or claims of other creditors against said company; that by the provisions of the said act under which said company was organized, all the stockholders were severally individually liable to the creditors of the corporation to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made, signed, and sworn to by the president of said company and a majority of its trustees, and recorded in the office of the clerk of the county where the business of said company is carried on. It is averred that said company failed to comply with the said provisions of said act, and did not, by its president and a majority of its trustees, make, sign, swear to, and record said certifi-

cate, either in the county of New York, the county in which the operations of said company were by their articles to be carried on, or in the said county of Escambia, in which said company carried on business, or in anywise as required by said act, so as to exempt the defendant from his individual liability. Wherefore, the declaration alleges, the defendant became and was liable to the plaintiffs for the said debt and contract made by the said company, and plaintiffs claim $28,000 and bring their suit.

The defendant demurs to the declaration—

First. Because it does not set forth any cause of action.

Second. Because it does not set forth any cause of action cognizable by said court.

The demurrer was sustained; thereupon it was taken by writ of error to the Supreme Court of the State of Florida, by which the judgment of the State Circuit Court on the demurrer was reversed, and the cause remanded for further proceedings.

The defendant thereupon filed pleas in substance as follows:

First. That the law under which said company was organized declares that no stockholder shall be individually liable for the debts of the company unless a suit for the collection thereof shall be brought against the company within one year after the debt shall have become due, and that no suit against said company for the debt mentioned in the declaration has been brought in the State of New York, although more than a year has elapsed since it became due.

Second. That the said company was organized on December 8th, 1865, under the law of the State of New York referred to in the declaration; that all its capital stock was paid up within a year after its organization; that defend-

ant did not become a stockholder until April 18th, 1872, and that the provision of said law in reference to the making and filing of the certificate of the payment of stock mentioned in the declaration had no application to defendant, or any other, except such as were stockholders within two years after the date of the organization of said company.

Third. That the original capital stock of said company was $75,000, all of which had been paid up in full; that defendant was the holder and owner of one-fourth thereof, to wit, $18,750, and that he has paid debts of said company over and above that sum.

Fourth. That the defendant did not become a stockholder in said company until five years after the lapse of the period of two years and thirty days from the organization thereof, within which last-named period said certificate of the payment of the capital stock of said company should have been filed, and, therefore, the plaintiffs are barred of any action against defendant based on an omission to file said certificate.

Fifth. That the law of the State of New York under which said company was organized declares that no stockholder thereof shall be individually liable for the payment of any debt of said company until an execution therefor issued against said company by a court of the State of New York has been returned unsatisfied, and that no such execution has ever been issued by a court of the State of New York and returned unsatisfied.

The plaintiffs demur to the first and second and fourth and fifth pleas, and reply to the third plea as follows:

That before the making of the contracts and the creating of the indebtedness by said company, to wit, in January, 1874, said company increased its capital stock from $75,000 to $300,000, of which latter amount of stock the defendant is the holder and owner of $75,000, and defendant has not

paid the debts of said company to an amount equal to said last-named sum.

After the filing of the above-mentioned pleadings the cause was, on the petition of the defendant, removed to the Circuit Court of the United States for the northern district of Florida, and afterwards the defendant filed a further (sixth) plea, in which he alleges:

That a large amount of debts, beside those named in the plaintiffs' declaration, was due to other creditors of the said company, exceeding the defendant's ability to pay.

The defendant also filed a rejoinder to the replication of the plaintiffs to defendant's third plea to the effect following:

That upon an increase of the stock of any company organized under the said law of the State of New York referred to in the declaration, the only certificate required to be made and filed in the office of the county clerk was one showing the proceedings of the meeting of stockholders to effect such increase, the amount of capital stock paid in, the business to which such corporation is extended or changed, the whole amount of debts or liabilities of the company, and the amount to or by which the capital stock should be increased or diminished, made out, signed, and verified by the affidavit of the chairman and countersigned by the secretary, and acknowledged by the chairman, and that such certificate was made and filed as required by the said statute in the office of the county clerk of the county of New York, in the State of New York, and also in the office of the secretary of state of the State of New York, and that the full amount of said increased stock was afterwards fully paid up, and that said increase in the stock was made and the additional stock fully paid up before said company incurred the debts to said plaintiffs in their declaration mentioned, and that it appeared in and by said certificate, and was the fact, that all the original capital stock of said company, to wit, $75,000, was fully paid up.

To the defendant's further (sixth) plea, and to the rejoinder to the plaintiffs' replication to the defendant's third plea, the plaintiffs demur.

The cause was heard upon the sufficiency of the declaration and of the several pleas demurred to, and upon the plaintiffs' demurrer to the rejoinder of the defendant, and judgment on the demurrer rendered for the defendant; and thereupon the plaintiffs took their writ of error from this court.

The plaintiffs in error assign errors as follows:

I. That the court below erred in holding that it had the power to review the decision and reverse the judgment of the Supreme Court of the State, rendered in this case prior to its removal.

II. That if said court had such power, it erred in sustaining the demurrer to the declaration and dismissing plaintiffs' suit.

POINTS.

I.

The judgment of the Supreme Court of Florida upon the writ of error presented no obstacle to the removal of the case under the act of 3d March, 1875.

Hewitt *v.* Phillips, 105 U. S., 393.

Being properly removed, the parties are subject to that administration of law which is approved in the judicial tribunals of the United States whose jurisdiction is invoked. (Ib., 396; King *v.* Worthington, 104 U. S., 44.)

The Circuit Court of the United States was not bound to follow and repeat the judgment of the State court upon the demurrer to the declaration when the sufficiency of the latter was again questioned upon demurrers to the subsequent pleadings.

It is an elementary rule of practice that upon a demurrer to a subsequent pleading a court may reconsider and reverse its former ruling upon a previous pleading.

A demurrer seeks the first fault in pleading.

Terry *v.* Tubman, 92 U. S., 160.

That this is a removed case renders the rule none the less applicable. The sixth section of the act of 1875 provides "that the Circuit Court of the United States shall in all suits removed under the provisions of this act proceed therein as if the suit had been originally commenced in said Circuit Court."

This case is an apt illustration of the confusion to which any other rule would lead.

The fundamental error of the decision of the Supreme Court of Florida, besides others which will be pointed out, is in declaring the liability in this case a common law liability. On the other hand, this court, in Pollard *v.* Bailey, 20 Wallace, 520, declare such a liability purely the creature of statute law. To hold that the Circuit Court was bound to follow this error and ignore the authority of this court would be a solecism in legal procedure. Besides, this court have defined the exercise of the right of removal in its essence appellate. (See Insurance Co. *v.* Dunn, 19 Wall., 214.)

II.

Mr. Chief Justice Taney, in delivering the opinion of the court in Bank of Augusta *v.* Earle, (13 Peters, 519–589,) says:

"It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have

always expounded and executed them according to the laws of the place in which they were made, provided that law was not repugnant to the laws or policy of their own country."

Story says:

"It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided." (Conflict of Laws, 8th ed., p. 35.)

But it is well settled that no State will enforce penalties imposed by the laws of other States. Such laws are universally considered as having no extraterritorial operation or effect. (First National Bank *v.* Price, 33 Md., 492.)

"The courts of no country execute the penal laws of another." (Mr. C. J. Marshall in Antelope, 10 Wheaton, 123.)

If the foreign law has for its object the imposition of punishment, then only the courts of the injured sovereignty should inflict the punishment. (Note to Story on Conflict of Laws, 8th ed., p. 845; Bettys *v.* The Milwaukee & Saint Paul Railway Company, 37 Wis., 323.)

Furthermore, the general principle of law is well settled, that when a statute confers a right and imposes a liability, *without providing a distinct remedy for their enforcement*, the common law supplies an adequate remedy by giving to a party an appropriate action, by which his rights may be enforced. But it is equally well settled that when a statute confers a right and prescribes a remedy, *that remedy, and that only*, can be pursued. (Knowlton *v.* Ackley, 8 Cushing, 97; Pollard *v.* Bailey, 20 Wall., 527.)

III.

The liability set forth in the declaration, being in the nature of a penalty imposed by a statute of New York, cannot be enforced in Florida. (Halsey *v.* McLean, 12 Allen, 538; Bird *v.* Hayden, 1 Robertson, 383; Derrickson *v.* Smith, 3 Dutcher, (N. J.,) 166; First National Bank *v.* Price, 33 Md., 487; Gales *v.* Eastman, 2 Id., 14; The State *v.* John, 5 Ohio, 217; Cable *v.* McCune, 26 Mo., 371; Lawler *v.* Burt, 7 Ohio St., 341.)

It is founded upon the following sections of a statute of New York of 17th February, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, &c., purposes:"

"[Sec. 10.] All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in and a certificate thereof shall have been made and recorded as prescribed in the following section; and the capital stock so fixed and limited shall all be paid in, one-half thereof within one year and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved."

"[Sec. 11.] The president and a majority of the trustees, within thirty days after the payment of the last installment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in; which certificate shall be signed and sworn to by the president and a majority of the trustees; and they shall within the said thirty days record the same in the office of the county clerk of the county wherein the business of the said company is carried on."

By section 10, individual liability is imposed upon stockholders for two causes: 1st, where the capital stock is not

paid up; 2d, where the certificate provided for in section 11 is not made and filed as required.

This action against a stockholder is founded upon the last predicate; and, therefore, official default is the gist of the liability sought to be enforced.

If the certificate had been filed, plaintiffs' debt could have imposed no liability upon the defendant.

A debt of absolute and primary obligation discharged without payment to the creditor, without his consent, and without his default, except in bankruptcy, would be a legal paradox.

The 10th section and the declaration show that the corporation is the original and primary debtor; and that defendant incurred liability for the debt by the failure of the officers to do a certain act—file the certificate.

The case is then: A corporate debt, and a stockholder's liability for it, incurred by the default of the officers of the corporation.

A statutory penalty is a liability resulting from the omission or commission of some act commanded or forbidden by law.

That a liability attaches before and until the command is obeyed makes it none the less a penalty than it would be if the sequence of disobedience; for in either case disobedience is the proximate cause of liability.

In the 11th section we find the command of the law; in the 10th section the penalty to enforce it.

Strike out the allegation in the declaration that no certificate was filed, and what would become of defendant's liability? When a fact stricken out of a pleading leaves no case, it must be the pivotal fact of that case.

In Woodruff and Beach Iron Works *v.* Chittenden, 4 Bosw., 406, at page 419, the court say, in reference to the rights of a stockholder who has paid a debt under the 10th section: "And we do not accede to the proposition that, under the statute in question, a stockholder who has been

compelled as such to pay debts owing by the company to the amount of his stock, can maintain an action at law by reason thereof against other stockholders to reclaim the whole or any part of the money so paid."

The liability is peculiar, and has not the ordinary characteristics of a debt. The claim does not survive. (Dane *v.* Dane Manuf. Co., 14 Gray, 488.)

The Merchants' Bank *v.* Bliss, 1 Robertson, (N. Y.,) 391, was an action founded on 12th section of the statute.

The liability of the trustees was declared to be in the nature of a penalty.

Between the liability under the 10th and 11th sections and that under the 12th section, no distinction can be made.

Both are contingent upon official default.

That in the one case the liability arises upon the default of the official agents of the stockholders, and in the other upon the officers' own neglect, can make no difference; for, "*qui facit per alium facit per se.*"

If appellee credited the corporation on the faith of appellant's contingent liability, so did the creditor in that case credit the corporation upon the contingent liability of the trustees if his contract was before their default, and upon their fixed liability if made after their default.

The position that appellant's liability is purely *ex contractu* rests upon the fallacy that it springs from the final or ultimate cause—the contract with the corporation; and not from the proximate cause—official default. "*In jure non remota causa sed proxima spectatur.*"

And accordingly the court, in The Merchants' Bank *v.* Bliss, said: "The defendant's liability does not arise from any act connected with the *debt.*"

In that case the liability arose from the failure of the trustees to file a certificate. Here it arose from the failure of trustees to do the like.

In both cases the debts were the debts of the corporation; in both, the debts were the final or ultimate cause of

the liability; and in both, OFFICIAL DEFAULT was the proximate cause.

And again, say the court: "IT IS DIFFICULT TO IMAGINE A LIABILITY MORE WANTING IN THE FEATURES OF A CONTRACT, OR MORE FULLY POSSESSING THOSE OF A PENALTY."

To the objection that the liability is not stated in form as a penalty—which seems to be the trouble in this case—it answers: "*There* is no instance of the infliction of a penalty of a fixed sum upon either directors or stockholders *eo nomine;* all those which are imposed are to indemnify an unpaid party either fully, or to the extent of the stock owned by the stockholders."

In three respects, liabilities under the 10th and 12th sections, respectively, differ, but none impair the analogy.

The stockholder is liable for the default of a careless trustee; the trustee for his own.

The stockholder is bound to an amount equal to his stock; the trustee to the extent of the debts—but the *quantum* cannot affect the nature of a liability.

The defaulting trustee, who pays debts, has an action for contribution against his co-trustees; but the stockholder has none against his co-stockholders. The penal ear-mark of the stockholder's liability is deeper and plainer than that of the trustee.

Bird *v.* Hayden, 1 Robertson, (N. Y.,) 383, was a case against an officer for official default under a Massachusetts act of incorporation, which it was held could not be maintained in New York, because the liability was in the nature of a penalty.

After stating what are original liabilities, the court says: "But where there is no qualification of the corporate capacity, and where the stockholders are not original and principal debtors, but they or the officers become liable by reason of some act the performance of which is imposed on them by the statute, the action must be on the statute to

recover a debt in the nature of a forfeiture for the failure to perform a duty."

Here is the precise case before the court: A liability measured by the defendant's stock, and contingent upon the performance of a certain act—filing a certificate.

What is said in the paragraph preceding the one above quoted has relation to cases like Corning *v.* McCullough, 1 Comst., 47, and the class to which it belongs, which are afterwards commented upon.

The distinction between a case under the 10th section of the statute of 1848 and Corning *v.* McCullough is clearly stated in Woodruff & Beach Iron Works *v.* Chittenden, 4 Bosw., at page 406.

Halsey *v.* McLean, 12 Allen, 438, was an action brought in Massachusetts upon the 10th, 12th, and 18th sections of the statute here involved. This action, so far as it related to the 10th section, was declared not maintainable in that State, because it involved a liability penal in its nature.

Derrickson *v.* Smith, 3 Dutch., 166, was an action like The Merchants' Bank *v.* Bliss, *supra*, founded on the 12th section of the New York statute, and it was held not maintainable in New Jersey because the liability was in the nature of a penalty. The comparative analysis of the case of The Merchants' Bank *v.* Bliss and this case applies with equal force to Derrickson *v.* Smith.

In Cable *v.* McCune, 26 Missouri, 371, a liability of stockholders to pay the debts of a corporation in case of the failure of the corporation to give a notice, was held to be in the nature of a penalty.

In First National Bank *v.* ~~Pierce~~ Price, 33d Md., 387, the liability was incurred when the directors and officers contracted the debt; and an immediate right of action was given against them. But because the debt was that of the corporation, and the ground of their liability official default, it was decided to be in the nature of a penalty. In this case the debt is that of the corporation; and the ground of ap-

pellant's liability for it is official default, not his own, but that of the trustees.

In Lawler *v.* Burt, 7 Ohio, 341, the suit was by a creditor against stockholders to enforce a liability for notes issued by their corporation. The liability was joint and several, and was incurred immediately upon the issuing of the notes; and yet inasmuch as the notes were those of the corporation, illegally issued by it, the liability of the stockholders was declared to be in the nature of a penalty.

In that case the issuing of the notes was forbidden; and the liability of the stockholders was the penalty for the disobedience of the officers of the corporation. In this case the filing of the certificate was commanded; and the liability of the stockholders is the penalty for the disobedience of the trustees.

In that case the issuing of the notes was the proximate cause of the liability. In this case the contract was the remote and the failure to file the certificate was the efficient or proximate cause.

In that case the liability, being joint and several, was, in form at least, a common law liability like Corning *v.* McCullough, supra. In this case it is in form and essence a statute liability. (Pollard *v.* Bailey, 20 Wallace, 520.)

The following as well as the above cases show that the crucial test of an individual liability for a corporate debt, being in the nature of a penalty, is THAT THE CONTRACT is with the corporation; and that the individual liability, either of the stockholders or officers, IS THE EFFECT OF THE LATTER HAVING DONE OR LEFT UNDONE some act required by law unconnected with the creation of the debt. (Garrison *v.* Howe, 17 N. Y., 458; Andrews *v.* Murray, 33 Barb., 354; Shaler & Hall Quarry Co., *v.* Bliss, 34 Barb., 309; Broughton *v.* Otis, 21 N. Y., 261; Squire *v.* Brown, 22 How. Pr., 45; Lawler *v.* Burt, Ohio St., 341; The Harrisburg Bank *v.* Commonwealth, 26 Pa. St., 451; Merchants' Bank *v.* Bliss, 35 N. Y., 414.)

IV.

The declaration (Record, 3,) is bad, because it does not show that the liability it sets up had been fixed and made actionable by legal proceedings against the corporation in the State of New York.

Section 24 of the statute of New York, referred to in the declaration, is as follows:

"[Sec. 24.] No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company, for any debt so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company, nor until an execution against the company shall have been returned unsatisfied in whole or in part."

The 10th and 24th sections, construed together, show that the liability created by the former is inchoate; and that it is the return of the *fi. fa.* unsatisfied which makes the liability of the stockholder absolute, fixed, and actionable.

To have that effect, the execution must necessarily be issued by the court of the State which declares by statute it shall have such effect; for it is well settled, that when a statute confers a right and prescribes a remedy, that remedy, *and that remedy only*, can be pursued. (Pollard *v.* Bailey; Knowlton *v.* Ackley, *supra.*)

But the force and effect of an execution issued by a Florida court against a New York corporation must be determined by the laws of Florida, not those of the State of New York.

Story Conflict of Laws, sec. 556–9.

In Hinckley *v.* Marean, 3 Mason, 88, Judge Story said:

"No court gives effect to the local laws of another State in respect to the form or force of process."

In Halsey *v.* McLean, *supra*, the court refused to enforce a liability under section 18, because the provisions of section 24 rendered the liability incapable of execution *alieno fero.*

Even a statutory modification of the remedy for a common law liability is not binding on the citizen of the State enacting it, where it necessitates a suit in another State. (Davie *v.* Hatcher, 1 Woods, 456; Higdon *v.* Bailey, 26 Ga., 426.)

In the fact that the right of action against the defendant in Dennick *v.* Railroad Company, 103 U. S., 11, was "fixed" in the State of New Jersey before it was asserted in New York, we have a marked distinction between that case and this.

This court in that case lay down the rule as follows:

"Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

Can it be said that in this case a right of action could become fixed and a legal liability incurred until the plaintiffs had adopted the means prescribed by the statute of New York by which alone that right of action could become fixed and that legal liability incurred? Why were not those means resorted to? The declaration shows that the county of New York was the county in which the operations of said company were by their articles to be carried on and their principal business done.

With respect to this question, the Court of Appeals of New York say:

"This liability cannot, I think, be said to attach to any particular stockholder until a suit is commenced against him to enforce it. The creditor has a right to select among the stockholders the individual against whom he will proceed; and, until he has made this selection, no particular stockholder is liable, and hence no interest can be allowed for any previous time." (Burr *v.* Wilcox, 22 N. Y., 557.)

Certainly the defendant's liability to these plaintiffs was not fixed, for he might have relieved himself, if he had not already done so, by payment of the amount of his stock to any other creditor or creditors of the corporation to that amount.

In Halsey *v.* McLean, *supra*, the court say:

"By section 24 it is an indispensable condition to the liability of a stockholder for the payment of any debt contracted by the company that a suit for its collection shall be brought against the company within one year after such debt shall become due. The present plaintiff had therefore lost his right to the particular remedy prescribed by the New York act, and the only one he was entitled to in that State before he instituted proceedings in Massachusetts."

V.

The case made by the declaration (Record, 2,) and the sixth plea, (Record, 19–20,) upon the demurrer to the latter, is not the subject of a common law action, but of a bill in equity.

Though the State of New York may by statute create a liability, it cannot prescribe, nor can its courts determine by construction, the remedy by which it is to be enforced in another State.

When we come to consider the *remedy* on a contract, with its various incidents, we are not governed by the *lex loci contractus*, but here the *lex fori* obtains. Every State reg-

ulates its own jurisprudence in its own way, as a part of its internal police, and with it the forms and modes of judicial proceeding as well as of enforcing judicial sentences. It has its own mode of enforcing rights and redressing wrongs; and whoever seeks either the one or the other in the courts of any State, must seek it in conformity with the mode of judicial action there established. This is a subject not depending upon the compact of the parties, but wholly independent of it. And in this particular we have to do with a matter not of conventional but of political arrangement. What the parties stipulated in their contract is one thing; what are the powers of judicial tribunals, and in what manner they are competent to redress wrongs, is a very different inquiry. Hence everything connected with the remedy has been uniformly held to fall within the *lex fori*. (Pickering *v.* Fisk, 5 Vermont, 108.)

The remedies administered by the courts of Florida are those known to the common law in its two branches of law and equity.

In Terry *v.* Tubman, 92 U. S., 156, this court said: "The case of Pollard *v.* Bailey, 20 Wall., 520, is an authority against the maintenance of a separate action by one creditor who seeks to obtain his entire debt, to the possible exclusion of others similarly situated. The proper proceeding is in equity, where all claims can be presented, all the liabilities of the stockholders ascertained, and a just distribution made."

VI.

The third plea (Record, 13) prevents a bar to the case made by the declaration.

It shows that defendant was, upon the basis of the original stock, discharged from liability for the failure of the officers to make and file the certificate provided for in the 10th section, by paying debts of the corporation to the amount of his share of that stock.

The replication (Record, 14) attempts to avoid the plea by making the increased stock the measure of liability.

The rejoinder (Record, 19) negatives any liability on the part of the defendant in respect to increased stock by alleging that the only certificate required upon an increase of stock was made and filed as required by the statute of New York. The section upon which the rejoinder is founded is as follows:

"[Sec. 22.] If at any time and place specified in the notice provided for in the preceding section of this act stockholders shall appear in person or by proxy, in number representing not less than two-thirds of all the shares of stock of the corporation, they shall organize by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy, and if, on canvassing the vote, it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the amount of capital, or of extending or changing its business as aforesaid, or for availing itself of the privileges and provisions of this act, a certificate of the proceedings, showing a compliance with the provisions of this act, the amount of capital actually paid in the business to which it is extended or changed, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed, and verified by the affidavit of the chairman, and be countersigned by the secretary, and such certificate shall be acknowledged by the chairman and filed as required by the first section of this act, and when so filed the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate, and the business extended or changed as aforesaid, and the company shall be entitled to the privileges and provisions and be subject to the liabilities of this act, as the case may be."

The liability set up in the declaration is founded upon the provisions of section 10. The unpaid stock liability and the certificate liability by that section are not co-

extensive. The former is limited only by "the amount of capital stock held," with no qualification as to original or increased stock. But the latter, founded upon official default, is in terms confined to the certificate "prescribed in the following section."

On the other hand, the stock referred to in section 11 is "capital stock so fixed and limited;" which must be that stock fixed and limited by section 1, which is as follows:

"[Sec. 1.] At any time hereafter any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical, or chemical business, or the business of printing and publishing books, pamphlets, and newspapers, or the business of preserving and dealing in meats, or the business of making butter, cheese, concentrated or condensed milk, or any other products of the dairy, or the business of erecting buildings for church sheds or laundry purposes, and the carrying on of laundry business, or the business of slaughtering animals, or for the purpose of towing or propelling canal boats, vessels, rafts, or floats on the canals and navigable rivers of the State of New York by animal or steam power, their operations not to be confined to the county in which their certificate shall be filed, may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the said company, and the objects for which the company shall be formed, the amount of the capital stock of the said company, the term of its existence, (not to exceed fifty years,) the number of shares of which the said stock shall consist, the number of trustees, and their names, who shall manage the concerns of said company for the first year, and the names of the town and county in which the operations of the said company are to be carried on."

The words of the 11th section, "so fixed and limited," can logically apply to no other capital stock than that pro-

vided for in section 1; for no antecedent section except that one provides for fixing and limiting stock.

To force the expression to embrace the increased stock provided for in section 22 would be giving a latitudinary instead of a strict construction to a statutory provision in its nature penal, according to the decisions of the courts of the State which enacted it.

To create any individual liability of members for the debt of a corporation, a body politic, created by law and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, *is a wide departure from established rules of law*, founded in consideration of public policy and depending solely upon provisions of positive law. It is, therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute. (Pollard *v.* Bailey, *supra;* Gray *v.* Coffin and others, assignees, 9 Cushing, 199.)

VII.

The fourth plea (Record, 13) is, in effect, a plea of the statute of limitations, the period of limitation in Florida for actions founded upon a statute being two years, if penal, and three years if otherwise.

McClellan's Dig. of the Laws of Fla., sec. 10, p. 733.

It states the time—two years and thirty days—within which the certificate should have been filed, according to the provisions of sections 10 and 11 of the New York statute; and further, that defendant did not become a stockholder until the lapse of five years from that time.

The gist of the stockholder's liability being official default, the right of action accrued and the statute of limitations began to run immediately after the default.

Terry *v.* Tubman, 2 Otto, 256.

Three years, therefore, after that default no action founded upon it could be maintained in the courts of Florida.

And two years before defendant became a stockholder the penal liability of stockholders, upon which he is sought to be made liable in this action, had been extinguished.

It may be objected that the principle of the plea involves the bar of a right of action for a debt before the debt is incurred.

But the debt, as before shown, is not the *gravamen*, but only one of the measures of the liability.

Again, plaintiff's demand is for a penalty incurred severally by the whole body of stockholders to all creditors who are in position to exact it; and the plea shows that the right of creditors to exact that penalty had been barred before the plaintiff became a stockholder. (Broughton *v.* Otis, 21 N. Y., 266.)

VIII.

With respect to the opinion of the Supreme Court of Florida in this case. They say: "The position [of the defendant] is that the liability is one created by the statute of another State, and is one *imposed by* such statute in consequence of the failure of certain officers to perform a required duty, and is therefore a *penalty* prescribed by such foreign statute, *and that the courts of this State cannot enforce such penal statutes.* If this deduction is correct, that this liability is a penalty, and not arising strictly out of contract, we are not prepared to deny the demurrant's conclusion." (16 Florida, 455.)

The court reach the following conclusion: "The defendant's liability as a stockholder, under the articles of association, *clearly rests in contract and not in tort, or dependent upon the conduct of the officers or agents of the company,* but only upon the non-payment of the debt by the principal debtor, and limited by the amount of his stock. If he has

paid any of the debts of the company, that is matter of defense under his contract." (*Ib.*, p. 464.)

There is no statute law in Florida with respect to comity.

The decision does not profess to be based upon any established rule of procedure in Florida.

The conclusions which it reaches are avowedly derived from the rules of the common law.

As a case professing to expound the common law applicable to the case it is in harmony with no acknowledged principle, and in conflict with every adjudication bearing upon the question it undertook to decide. It even ignores the construction which the courts of New York have placed upon a statute of that State. The courts of New York have declared that a liability like that sought to be enforced here is penal in its character; the Supreme Court of Florida declares that it is a debt at common law, modified by statute. The decision is based upon a state of facts which is not to be found in the record. The declaration rests the liability of the defendant upon the failure of the officers to file a certificate, "wherefore," as it says, "the defendant became and is liable to the plaintiffs for the said debt." The opinion of the court, on the other hand, denies or controverts that statement of the declaration, as follows:

"The defendant's liability as a stockholder, under the articles of association, clearly rests in contract and not in tort, or dependent upon the conduct of the officers or agents of the company, but only upon the non-payment of the debt by the principal debtor, and limited by the amount of his stock."

That the court, by this process of reasoning and disregard of the facts of the case, as shown by the pleadings, should find itself in conflict with the Supreme Judicial

Court of Massachusetts in Halsey *v.* McLean, *supra*, is not a matter of surprise.

The opinion distorts the law of Bird *v.* Hayden, *supra*, by making a principle which that case announces as a matter of contrast to the real legal aspect of that case, citing and relying upon the contrast, ignoring and suppressing the true principle announced in that case, (which is in perfect harmony with this case,) as follows:

"But where there is no qualification of the corporate capacity, and where the stockholders are not original and principal debtors, but they, or the officers, become liable by reason of some act the performance of which is imposed on them by statute, the action must be on the statute to recover a debt in the nature of a forfeiture, for the failure to perform a duty."

And finally the case came before the court upon an interlocutory judgment, and was, therefore, *coram non judice*. (Bennet *v.* Branch, 5 Fla., 447; Dawkins *v.* Carroll, Ib., 407; Watson *v.* Sarell, 9 Fla., 506; Barcley *v.* Rush, 13 Fla., 58.)

No consent, expressed or implied, could vest jurisdiction. (Dorden *v.* Lynes, 2 Fla., 569.)

The judgment of the court was a nullity.

Much stress is placed upon the decision of the Court of Appeals of New York in Corning *v.* McCullough, 1 Comst., 57.

In order to mark the fundamental difference between the liability of a stockholder under the act of incorporation involved in that case and the liability of a stockholder under the act involved in this case, it is only necessary to refer to the terms of the two acts. By section 9 of that act (the act incorporating the Rossie Galena Company, N. Y. Statutes of 1837, p. 445) it is provided that the stockholders of the corporation shall be jointly and severally personally liable for the payment of all debts and demands contracted by the corporation, and that any person having

any demand against such corporation *may sue any stockholder or director in any court having cognizance thereof*, and recover the same.

By the tenth section it is provided that, before any such suit shall be commenced, judgment shall have been obtained against the corporation, and execution issued thereon and returned unsatisfied, or that the corporation shall have been dissolved.

This is the only limitation put upon the remedy of the creditor of the corporation against the stockholder for his debt or demand against the corporation. The stockholders are made jointly and severally liable for the debts and demands contracted by the corporation, not as a penalty for a failure on their part to pay their subscription to the capital stock, nor as a penalty for a failure on the part of the trustees, when the capital stock shall have been paid in full, to file the certificate thereof prescribed by statute, but they are made liable originally, absolutely, and unconditionally for the debts of the corporation, as much so as the corporation itself. And it is declared that the person having such debt or demand against the corporation may sue any stockholder or director in any court having cognizance thereof, provided he first ascertains by a judgment against the corporation and an execution thereon returned unsatisfied that the corporation is unable to pay his debt or demand, or provided the corporation shall have been dissolved.

The personal liability of the stockholder to pay the debt is the immediate and necessary consequence of the contract made by the company. It becomes, by the terms of the charter, his debt. Under such an act of incorporation the courts of New York say the liability of stockholders for the debts of the corporation is not in the nature of a penalty, but may be enforced as a contract. Judge Bronson, in Corning *v.* McCullough, (1 Comstock, 47,) states in a suc-

cinct manner the ground upon which the courts base their decision, as follows:

"That the stockholders stood substantially upon the same footing as to liability as though they had been partners, or an unincorporated association; that they were answerable to the creditors of the company as original and principal debtors, though the creditors are first to exhaust their remedy against the corporation."

The act of incorporation in that case did not take away from the stockholders their common law liability, but, on the contrary, expressly provided that such liability should remain.

In the statute under consideration the common law liability of the stockholder is taken away. The stockholder is not liable for the debts of the corporation unless it fails to obey the command of the law.

With respect to the liability imposed by sections 12 and 13 of the act under consideration, the Court of Appeals of New York say: "It is clear that there was no primary liability of these defendants for the debt of the Empire Stone Dressing Company to the plaintiffs. The liability of the company was upon the acceptance of a bill of exchange. The liability of these defendants arose only from their violation of the directions of the sections above quoted from the act under which the corporation was formed; not from their personal contract. *The case under consideration differs, in that respect, in toto, from the case of Corning* v. *Mc Cullough,* (1 Comst., 47.) There the stockholders were primarily liable for the contracts of the company, by the terms of their act of incorporation, as determined by this court in the report of the case, (p. 57.) It was an action to recover a debt or damages due from the defendants for goods delivered by the plaintiff on the credit of the defendants, although not on their request." (Merchants' Bank *v.* Bliss, 35 New York, 414.)

Under these sections "it is not necessary that the creditor

should have sustained any injury or damage by reason of a violation of those sections. It is sufficient that the party prosecuting the action *should be a creditor when the violation of the law takes place.*" (Ib., 416–417.)

C. W. JONES,
R. L. CAMPBELL,
MICHAEL L. WOODS,
For Defendant in Error.

109-371

Supreme Court of the United States.

October Term, 1883.—No. 121.

WILLIAM FLASH ET AL., AS FLASH, LEWIS & CO.,
PLAINTIFFS IN ERROR,

v.

ADNA C. CONN.

SUPPLEMENTAL BRIEF IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

In Hewitt *v.* Phillips, 105 U. S., 393, the question presented and determined by the State Supreme Court was not the question subsequently considered by the Circuit Court. The latter court was called upon to decide upon new facts in amended pleadings; and besides, it was not called upon to decide whether the facts thus presented entitled complainant to relief under the rules and principles applicable to the administration of equity by the State courts, which are often quite different from those governing such administration by the United States court. Thus many of the States have invested their courts with equity jurisdiction unknown to the administration of the United States courts as courts of equity. In this case, as in King *v.* Worthing, "the ruling of the Circuit Court in the progress of the cause after its removal did not reverse or vacate anything which had previously been adjudicated by the State court."
104 U. S., 44.

In the case at bar, the issue between the parties, and the only issue, was whether the liability sought to be enforced was one sounding in contract, or one imposed as a penalty or forfeiture. The Supreme Court held the defendant liable as upon contract, and that the courts of Florida could enforce the liability. The Circuit Court reversed that judgment, and held the defendant was not liable as upon contract, and that the courts of Florida could not enforce the liability, and dismissed the plaintiff's cause, which it is respectfully suggested should have been rather remanded to the State court, if there was any lack of power in the Circuit Court to do what the State court was willing to do—enforce a liability upon a citizen of the State in behalf of citizens of another State.

II.

In Pollard *v.* Bailey, the statute before the court had prescribed the remedy to be "*upon bill filed in chancery*, and Bailey sued Pollard *at law*." (20 Wall., at 522.)

So in Knowlton *v.* Ackley, the statute provided two specific alternative remedies—one for taking the property or person of a stockholder on a writ of attachment or execution against the corporation, the other by bill in equity.

The court in Van Riper *ex parte*, (20 Wend., 614,) in considering a charter which contained a requirement precedent to a suit, as does the charter in the case at bar, inasmuch as it provided that "upon demand being made at the bank during the usual hours of business and refusal thereof, an action may be brought," &c., says "the charter in fact institutes no remedy."

Nor does it in the case before the court.

III.

The defendant insists, as the court below held, that the liability is a penalty imposed by the statute, and refuses to

admit the distinction between the liability under section 10 and that under section 12.

The plaintiffs, in addition to the authorities cited in their brief, invite the attention of the court especially to the case of Wiles *v.* Suydam, 64 N. Y., 173.

The court in this case marks the distinction so clearly, there is left no further room for question or argument.

The case has this head-note:

"A complaint setting forth facts sufficient and seeking to charge defendant as a stockholder of a manufacturing corporation organized under the general laws, (chap. 40, Laws of 1848,) with a debt of the corporation because of a failure to make and record the certificate required by said act, (section 10,) and also alleging the requisite facts and seeking to charge him as trustee with the debt, because of failure to file an annual report, (section 12,) contains two separate and distinct causes of action which cannot properly be united.

"*The first cause of action is one upon contract;* the second is an action upon a statute for a penalty or forfeiture."

And at 176 the court says:

"The cause of action against the defendant as a stockholder consists of the debt and the liability created by statute against stockholders when the stock has not been paid in and a certificate of that fact recorded. In fact the statute in such a case withholds the protection of the corporation from the stockholders, and regards them liable to the extent of the amount of their stock as copartners. (Corning *v.* McCullough, 1 N. Y., 47.) The allegations in the complaint are sufficient to establish a perfect cause of action against the defendant as a stockholder primarily liable for the debts to the amount of his stock."

The court then says:

"The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, *but of an entirely different character;* here the liability is created by statute, and is in the nature of a penalty *imposed* for neg-

lect of duty in not filing a report showing the situation of the company.

"The *object* of the action is the same, viz., the collection of the debt; but the *liability and the grounds of it are entirely distinct and unlike.* That there are two causes of action in this complaint seems too clear to require much argument. The more difficult question is, whether they may be united in the same complaint. *The first cause of action against the defendant as a stockholder is an action on contract.* The six years' statute of limitation applies. (1 N. Y., *supra.*) The defendant is entitled to contribution. (3 Hill, 188.) But in respect to the action against defendant as trustee, this court held in Merchants' Bank *v.* Bliss, (35 N. Y., 412,) that the three years' statute of limitations applied under the following provision of the Code: 'An action upon a statute for a penalty or forfeiture where the action is given to the party aggrieved.' (Section 92.)"

The defendant's pleas were in nowise considered by the court below, and cannot be considered here.

Defendant had waived his demurrer by pleading his pleas; and if the pleas had been considered and any of them held good, plaintiffs, after the overruling of their demurrer to such, were entitled under the law and practice in Florida, as binding upon the United States as the State court, to reply.

Thus, if it had been held, for instance, that the defendant's first plea—to wit, that no suit had been brought in the State of New York—was a good plea, plaintiffs could have traversed the allegation.

Or if no suit had been brought in New York they could have confessed and avoided the allegation by showing that the company's property domicil, at least, was in the county in which all its property as well as all its manufacturing business was, viz., in the county in which the suit was brought.

They could also, by their reply, have set forth that the plaintiffs were prevented from bringing suit by the act of

defendant and his associates in dissolving the association by their voluntary bankruptcy.

The courts of New York have held that for the judgment and execution against a debtor and the return unsatisfied to constitute *prima facie* evidence, that the debt cannot be collected from the debtor, the execution must have issued to the county in which the debtor has his domicil, because it is presumed that his property is where he resides; and have applied the same rule to cases under the manufacturing act.

In the case of Rocky Mountain National Bank *v.* Bliss 89 N. Y., 338, the court held that a judgment and execution in another State, by foreign attachment proceedings, which were in effect only a judgment and execution, against a fraction of the property was not sufficient evidence of inability to collect from the company. And the court applies the rule applied by the courts to the statute requirement necessary to entitle a creditor to file a creditor's bill, in which cases it was held that in case the execution issued to another county than that in which the debtor had his domicil, the complainant must by distinct averments repel the legal presumption of property in the county where the defendant has a fixed residence.

Child *v.* Brace, 4 Paige, 309.

Crippin *v.* Hudson, 13 N. Y., 161.

Merchant's and Mechanic's Bank *v.* Griffith, 10 Paige, 519.

They could by their reply show, as do the averments in the declaration, that by reason of the dissolution of the association by its voluntary bankruptcy, the plaintiffs were not only absolutely precluded from in any way collecting any part of their debt from the company, but were prevented from any other or further proceedings against the company by the acts of the stockholders, which would be held to